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**CONSUMER PROTECTION LAW IN THE ONGOING EUROPEAN
INTERNAL ENERGY MARKET BY THE EXAMPLE OF THE
ELECTRICITY DIRECTIVE 2009/72/EC**

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Dresden, im April 2014

Friedrich Ziegler

I hereby declare that I wrote this dissertation by myself, that all used resources and literature were properly cited, and that this dissertation has not been used in order to be granted another or the same academic degree/title.

Dresden, 9 April 2014

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LIST OF ABBREVIATIONS

ABl.	Amtsblatt
Abs.	Absatz
Abschn.	Abschnitt
ACER	Agency for the Cooperation of Energy Regulators
AcP	Archiv für civilistische Praxis
ADR	Alternative dispute resolution
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
AGB-Gesetz	(Deutsches) Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
AöR	Archiv für öffentliches Recht
Art.	Artikel
art.	article
AS-Stellen	Stellen für alternative Streitbeilegung
B2C	business to customer
Bd.	Band
BGB	(Deutsches) Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt (Bonn)
BRD	Bundesrepublik Deutschland
D	Deutschland
dms	Der moderne Staat
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
E.C.R.	European Court Report

EEA	Einheitliche Europäische Akte
EEC	European Economic Community
EEG	(Deutsches) Erneuerbare-Energien-Gesetz
e.g.	exempli gratia, for example
EGV	Vertrag zur Gründung der Europäischen Gemeinschaft
Einf.	Einführung
EMRK	Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten
ENTSO	European Network of Transmission System Operators for Electricity/Gas
EnWG	(Deutsches) Energiewirtschaftsgesetz
EnWZ	Zeitschrift für das gesamte Recht der Energiewirtschaft
ERGEG	European Regulators Group for Electricity and Gas
et	Energiewirtschaftliche Tagesfragen
et seq.	et sequens, and the following
EU	European Union
EuR	Europarecht
EUV	Vertrag über die Europäische Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
e.V.	eingetragener Verein
EVU	Energieversorgungsunternehmen
EWG	Europäische Wirtschaftsgemeinschaft
EWGV	Vertrag über die Europäische Wirtschaftsgemeinschaft
EWS	Europäisches Wirtschafts- und Steuerrecht
Fs.	Festschrift
FRG	Federal Republic of Germany
GewArch	Gewerbearchiv

GPR	Gemeinschaftsprivatrecht
GRCh	Charta der Grundrechte der Europäischen Union
i.e.	id est, that is
ISO	independent system operator
ITO	independent transmission operator
JRP	Journal für Rechtspolitik
JZ	Juristenzeitung
KOM	Mitteilungen der Europäischen Kommission
lit.	littera, letter of the alphabet
MünchKomm	Münchener Kommentar
N&R	Netzwirtschaften und Recht
NJW	Neue Juristische Wochenschrift
no	number
NRW	Nordrhein-Westfalen
ÖBl.	Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht
OJEU	Official Journal of the European Community
OLG	Oberlandesgericht
p.	page
para.	paragraph
RdE	Recht der Energiewirtschaft
Rspr.	Rechtsprechung
RWE	Rheinisch-Westfälisches Elektrizitätswerk
s.	sentence
SME	small and medium-sized enterprises
StromEinspG	(Deutsches) Stromeinspeisungsgesetz
subpara.	subparagraph

TEC	Treaty establishing the European Communities
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TKG	(Deutsches) Telekommunikationsgesetz
TSO	Transmission System Operator
tv	television
UK	United Kingdom
UWG	(Deutsches) Gesetz gegen den unlauteren Wettbewerb
v.	versus
VersR	Versicherungsrecht
VKU	Verband kommunaler Unternehmen
VO	Verordnung
VuR	Verbraucher und Recht
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler
WiVerw	Wirtschaft und Verwaltung
WRP	Wettbewerb in Recht und Praxis
WuW	Wirtschaft und Wettbewerb
Z Energiewirtsch	Zeitschrift für Energiewirtschaft
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für europarechtliche Studien
ZG	Zeitschrift für Gesetzgebung
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZNER	Zeitschrift für Neues Energierecht
ZZP	Zeitschrift für Zivilprozess

1 INTRODUCTION

The European Parliament and the Council of the European Union have announced in the Official Journal of the European Communities on 14 August 2009 two Directives replacing the current so-called "Acceleration Directives" from 2003¹ and three Regulations. This at 3 September 2009 came into force package, that is designated in its entirety as the so-called "Third Internal Energy Market Package"², describes the current legal framework for the European energy law in the context of the gradual liberalization of national energy markets with the objective of completing the internal European energy market and thus pursuing the aim to increase sustainability, competitiveness and security of supply.

Particular attention has to be paid on the structural speciality of the grid-based electricity supply, which is different in comparison to the telecommunications sector, where a provision of communication services via alternative networks such as fixed and mobile networks, but also through broadcasting networks and via antenna or satellite can be made. Based on the principle of not replicable network infrastructure in the electricity sector as a natural monopoly competition is eliminated. To initiate competition on the electricity distribution sector, however, electricity suppliers depend on a mandatory grant of discriminatory network access through the network operators. Here, a major challenge is the granting of such a network access to all electricity suppliers regardless of that they act as competitors to the end customers of such companies as electricity suppliers, which are affiliated with the network operators with company law and thus entrepreneurial.

1 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJEU L 176, 15/07/2003, p. 37 et seq. and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJEU L 176, 15/07/2003, p. 57 et. seq.

2 This package consists of five new legal acts: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/55/EC, OJEU L 211, 14/08/2009, p. 55 et seq.; Directive 2009/73/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJEU L 176, L 211, 14/08/2009, p. 94 et. seq.; Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJEU L 211, 14/08/2009, p. 1 et seq.; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity repealing Regulation No 1228/2003, OJEU L 211, 14/08/2009, p. 15 et seq.; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation No 1775/2005, OJEU L 211, 14/08/2009, p. 36 et seq.

1.1 Liberalization of the electricity sector – initial situation

So far, these specifications were not sufficiently taken into account in the grid-based electricity sector. The sector inquiry has identified a number of serious shortcomings, which prevent European energy users and consumers from “reaping the full benefit of the liberalization of the market”.³ The result is that objectives of market opening have not been reached yet; despite the liberalization of the internal energy market barriers to free competition remain.⁴ In contrast to the advanced liberalization of the telecommunications market, which is particularly characterized by the opening of new markets such as the mobile phone market as well as the digitization of communications services, strong competition in the electricity sector to the homogeneous product electricity is not available yet to the desired extent.

Hence, the elimination of existing barriers to competition and, consequently, the protection of the consumers are key objectives of the Electricity Directive 2009/72/EC (hereinafter: Directive 2009/72/EC), which updates as a fundamental requirement the guaranty of a so-called universal service as a basic supply of specific customer groups by Member States. This means the right to be supplied with electricity of a specified quality at reasonable, easily and clearly comparable, transparent and non-discriminatory prices.⁵ In addition, other consumer protection provisions are contained in this Directive including Annex I "measures to protect customers", which updates the former by the predecessor Electricity Directive 2003/54/EC (hereinafter: Directive 2003/54/EC) largely in Annex A already existing legal rights and supplements them with new provisions; it also highlighted the central importance of the regulatory law by a separate chapter in this Directive. It is important to ensure as a objective a high level of protection for consumers particularly in relation to transparency of conditions, general informations and dispute resolution as well as enabling a change free of charge without obstacles to another energy supplier⁶; to reach this aim supervision by regulatory authorities should contribute therefore as well. So an intact, thus functioning internal energy market with secure supply at competitive prices, which is an essential and fundamental

3 Communication from the Commission - Inquiry pursuant to art. 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final, p. 15.

4 Communication from the Commission - Inquiry pursuant to art. 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final, p. 2.

5 See art. 3 para. 3 s. 1 Directive 2009/72/EC.

6 Communication from the Commission – Towards a European Chapter on the Rights of Energy Consumers, COM(2007) 386 final, p. 6.

requirement for consumers as beneficiaries of effective competition, should be achieved.

Therefore, the question to be examined as a focal point of this work is, which competences are available to the EU legislator from the perspective of consumer protection, to achieve this objective and what measures are needed to protect the mature and informed consumer in his role as a self-determined market participant taking into account the above mentioned specifics of a grid-bound electricity supply.

1.2 Aim of the study

The aim of this work is therefore to examine the consumer protection legislation including regulatory and dispute settlement mechanisms of the Directive 2009/72/EC with regard to the objective of the EU of ensuring a high level of consumer protection in the energy sector and to show still existing deficits in this Directive. To remedy still existing shortfalls initial solutions are partly already presented or proposals are submitted.

Essential prerequisite to ensure effective competition in distribution so the electricity supply to the consumers and thus to achieve a high level of consumer protection is to ensure effective state regulatory supervision in the area of the network monopoly sector. In this context, both the factual relationship between the European idea of competition and its immediate consideration for ensuring the functioning of the internal energy market should be identified and the importance of an effective competition as an essential part of a completed internal energy market and as a basic prerequisite for an effective consumer protection will be illustrated. It is further considered in the light of the characteristics of the grid-based electricity supply based on the regulatory law principles enshrined in the Directive 2009/72/EC, whether it is capable and able to protect the consumer effectively against the abuse of the network operators' monopoly.

With its investigation results the work aims to raise awareness in terms of the need for a continuous improvement of consumer protection and provides guidance for a continuation of the energy-specific consumer protection legislation.

1.3 Course of the study

In the first part the content of the primary law cross-section competence for the energy sector is explained by consideration of significant competition rules after a general introduction of the importance of the internal energy market. The principles relating to public services in the energy sector as competition law legal exception are represented. Effective competition, which can not work by itself due to the existing network monopolies, is essential to achieve effective consumer protection. This part closes with an aggregated view of the central importance of the regulatory law and therefore the regulation, which substitutes the non-existent competition as a result of network monopolies, and thus represents a crucial requirement for the promotion of significant internal market competition at distribution level.

The development and objectives of the European consumer protection law, the creation of a separate cross-section competence and its relation to the internal market competence as well as the need to create a coherent consumer protection in relation to the energy-specific consumer protection rules are the subjects of the second part of the thesis. In this context it will be clarified, what fundamental alignment options are available to the Union to achieve the objective of a high level of protection by the example of the Directive 2009/72/EC and how effective competition and high level of consumer protection relate to each other in the context of the intended completion of the internal electricity market.

The third part gives a detailed study of Directive 2009/72/EC from a consumer protection point of view. The changes of already enshrined consumer protection rights in the Directive 2003/54/EC are shown in relation to the subsequent Directive 2009/72/EC. It should be distinguished between the so-called competition area namely the supply branch on the one hand and the network section as a monopoly area on the other. Based on this distinction the main consumer provisions of secondary legislation are examined also in terms of deficits. In this connection needs also to be clarified, what influence from a consumer perspective the out-of-court dispute settlement as well as the regulatory oversight on the objective of achieving the highest possible level of consumer protection in the European energy market have.

Lastly, the fourth and final part summarizes the findings as a whole, derives statements and gives an outlook on possible developments in the future.

2 PART 1 - DEVELOPMENT OF INTERNAL ENERGY MARKET

Energy is of the greatest importance in ensuring social and territorial cohesion, economic stability and sustainable development; an adequate energy supply therefore constitutes one of the key elements towards achieving citizens' successful participation in social and economic life - a sufficient number of market competitors, an extensive supply offer, competitive prices and active as well as informed consumers can create a genuine internal market for electricity and gas.⁷

Without energy people cannot live in today's economic and social environment; electricity is essential to citizens' daily life.⁸

2.1 Internal market

According to art. 3 para. 3 TEU the Union shall establish an internal market, which is defined by art. 26 para. 2 TFEU as an area without internal frontiers, in which the free movement of goods, persons, services and capital as so-called fundamental freedoms is guaranteed by both TEU and TFEU (hereinafter: "Treaties"). In addition to these aforementioned fundamental freedoms, which are interpreted as discrimination and restriction bans, the single market concept is complemented by competition rules (art. 101 et seq. TFEU) as well as by provisions on the approximation of laws (art. 114 et seq. TFEU). In achieving or preserving the internal market within the meaning of art. 26 para. 1 TFEU is a central, legally binding target and a fundamental principle of the Treaties; many provisions of the Treaties are based on this target and principle from different directions and views.⁹ It can speak of a horizontal objective of fundamental relevance and the heart of European integration.¹⁰ The objective of the internal market has to fit in the sense of a practical concordance to the other particularly social and environmental objectives of the Treaties, which are fundamentally of equal rank and may in some individual case enjoy even relative priority.¹¹

⁷ Communication from the Commission – Towards a European Charter on the Rights of Energy Consumers, COM(2007) 386 final, p. 16.

⁸ Communication from the Commission to the Council and the European Parliament - Prospects for the internal gas and electricity market, COM(2006) 841 final, p. 20.

⁹ Kahl, in Calliess/Ruffert, EUV/AEUV, art. 26 para. 15.

¹⁰ Kahl, in Calliess/Ruffert, EUV/AEUV, art. 26 para. 15; see also Möstl, Vertrag von Lissabon, p. 122.

¹¹ Kahl, in Calliess/Ruffert, EUV/AEUV, art. 26 para. 30; Lorenz, Umweltschutz und wettbewerblich konzipierter

With the completion of the internal market, the uninhibited sell of products for manufacturers and suppliers within the Community as well as the consumers access to the best deals from the Member States should be allowed.¹² To achieve this objective the Commission proposed in June 1985 in its White Paper on completing the internal market¹³ numerous concrete harmonization measures, which related, inter alia, on improving the conditions for cross-border activities of companies and physical barriers as well as referring to the elimination of non-tariff barriers to trade as technical barriers resulting from different provisions of the Member States in the areas of consumer protection.¹⁴

In numerous places the Treaties referenced on the internal market objective namely, inter alia, in the general task of art. 3 para. 3 TEU as well as in the provision concerning the approximation of laws of art. 114 TFEU, in the general energy competence title of art. 194 TFEU and in the consumer protection law clause of art. 169 TFEU; the two latter special competence titles and their relationship to the general standard on the alignment of legislation in the internal market together with the requirements for an approximation of laws in the sense of art. 114 TFEU are presented in part 2 of this work.

2.2 Internal energy market - own cross-section competence, art. 194 TFEU

The establishment of the internal market in the aforementioned sense includes also the energy sector, where in several stages by different policy packages measures had been already taken, to create an internal market for the grid-bound and therefore traditionally very monopolistic distributed forms of electricity and gas as well as to the further improvement of the security of supply.¹⁵

The completion of the internal market in energy requires the removal of many still existing trade barriers and obstacles with the aim to create a well-functioning market, which is characterized,

Binnenmarkt im Gemeinschaftsrecht, 2004, p. 51 et seq.; Möstl, in EuR 2002, p. 318 at p. 335 et seq.; Hatje, in Schwarze/Becker/Hatje/Schoo, EU-Kommentar, art. 14 EGV para. 11.

12 Borchard, Die rechtlichen Grundlagen der Europäischen Union, p. 351 para. 791.

13 Commission of the European Communities – Completing the internal market, White Paper from the Commission to the European Council, COM(85) 310 final, p. 1 et seq.

14 Borchard, Die rechtlichen Grundlagen der Europäischen Union, p. 351 para. 792; Hobe, Europarecht, p. 159 para. 4.

15 Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 412 para. 6.

among other things, by a fair market access and a high level of consumer protection. Consumer protection is therefore generally taken into account even in the definition and implementation of other Union policies and activities.¹⁶ On 4 February 2011 the European Council agreed on the ambitious goal of completing the internal energy market by 2014 and ensure that "energy islands" in the EU are eliminated by 2015.¹⁷

2.2.1 Legal situation before the Lisbon Treaty

Efforts to establish the energy sector as a separate area in the EU primary law already existed in the negotiations on the Maastricht Treaty amendments in 1992.¹⁸ Although measures in the field of energy belonged to the objectives of the Maastricht Treaty¹⁹, from which, however, none of the Community competences could be deduced.²⁰ The energy policy task standard according to art. 3 para. 1 lit. u) of the EC Treaty (now art. 4 para. 2 lit. i) TFEU) does not represent an own energy policy competence of the Community; for the Community acts only in accordance with the Treaty in the sense of art. 3 of the EC Treaty. In addition, the Community must act in accordance with the principle of conferral according to art. 5 para. 1 of the EC Treaty (now art. 5 para. 1 s. 1, para. 2 TEU) exclusively within the limits of its responsibilities and its set objectives; competences, that are not conferred upon the Community, remain therefore with the Member States. Until the entry into force of the Lisbon Treaty the Community has supported its energy policy to the predecessor provisions of art. 352, 114, 192, 179 et seq. and 170 et seq. TFEU, i.e. art. 308, 95, 175, 163 et seq. as well as 154 et seq.²¹, and thus availed herself as part of the steadily growing importance of energy

¹⁶ Hobe, *Europarecht*, p. 242 para 278.

¹⁷ Mellar/Nenova, *Energy Policy: General Principles, Fact Sheets on the European Union – 2013. Achievements – 1. Promoting infrastructure essential to the EU's energy needs*, p. 3; Report (21/12/2012) on the role of EU cohesion policy and its actors in implementing the new European energy policy (2012/2099(INI)) – Committee on Regional Development – Opinion of the Committee on industry, research and energy (8/11/2012), Suggestions No 2.: "[...] emphasizes the need for cooperation at national and European level between municipalities and regions, which can contribute to the elimination of energy islands [...]" "see also Directive 2009/72/EC – recital (58), where reference is made to "incorporating isolated systems forming energy islands, that persist in the Community".

¹⁸ Maichel, in Hendler, p. 55 at p. 63.

¹⁹ Treaty on European Union (Maastricht TEU), OJEU C 191, 29/7/1992, p. 1; renumbered by the Treaty of Amsterdam, Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJEU C 340, 10/11/1997, p. 1 (Treaty of Amsterdam).

²⁰ Ruffert, in Calliess/Ruffert, *EUV/AEUV*, art. 3 para. 2.

²¹ Kotzur, in Geiger/Khan/Kotzur, *EUV/AEUV*, art. 194 para. 4.

policy of different competences, which are not directly affected the energy sector.

2.2.2 Treaty of Lisbon

With the entry into force of the "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community" on 1 December 2009, signed at Lisbon on 13 December 2007²², a long period of uncertainty regarding the future constitution of the European Union has come to an end.²³

The EC Treaty is now known under the title "Treaty on the Functioning of the European Union". The "Treaty on European Union" retained, despite some change, in its title. TEU and TFEU constitute under art. 1 para. 2 s. 1 TFEU the Treaties, on which the Union is pursuant art. 1 para. 3 s. 1 TEU founded. According to art. 1 para. 3 s. 2 TEU both Treaties have the same value. The most important change caused by the Lisbon Treaty is that according to art. 1 para. 3 s. 3 TEU the European Union occurs through the transfer of all rights and obligations as the legal successor to the position of the European Community, which disappears as an independent legal personality; the term "Union" now consequently occurs in a wide variety of contractual provisions to replace the previous notion "Community". The Union has both pursuant to art. 47 TEU externally and according to art. 335 TFEU internally, i.e. towards the Member State legal personality.

2.2.3 Own energy competence according to Treaty of Lisbon

Due to the rapid development of the energy sector and its increasing importance an independent energy policy competence standard has been deemed necessary and was first used in art. I-14 para. 2 lit. i), art. III-256 TCE²⁴ codified as a new shared competence of the Union in a separate section 10 of the TCE. The Treaty of Lisbon repeated these provisions in art. 4 para. 2 lit. i), art. 194 TFEU

22 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJEU C 306, 17/12/2007, p. 1.

23 Terhechte, in EuR 2008, p. 143.

24 Treaty establishing a Constitution of Europe, OJEU C 310, 29/10/2004, p. 1 – the Treaty should come into force on 1/11/2006, but has not been ratified by all Member States (failed on referendums in the Netherlands and France) and therefore gaining no legal force; instead the Lisbon Treaty was concluded.

(Title XXI) unchanged at its core.²⁵

With the creation of an independent general energy competence in art. 194 TFEU the Lisbon Treaty caused a significant innovation of European business law with its entry into force.²⁶ Thus, a standard was created, that grants the Union general energy policy powers and, at the same time, provides a legal foundation for the energy policy pursued already for a long time.²⁷ The new energy competence standard represents on the principal of conferral of the EU the primary legal basis in relation to the general legislative competence of the Union to achieve the internal market objectives referred to in art. 194 para. 1 TFEU, which are explained below.

Against this background, it first raises the question of the relationship between art. 194 para. 1 lit. a) TFEU to art. 114 TFEU as the current internal universal market competence used by the Community. This will be discussed in the following part 2 under 3.5.1.2.3 in the context of the representation of the general internal market competence of the EU.

2.2.4 Energy-specific allocation of tasks and competences

Hereinafter, art. 194 TFEU will be examined from the perspective of the ongoing internal energy market. Other special energy competences such as art. 122 TFEU, which is relevant in the presence of serious difficulties in energy supply, as well as art. 170 TFEU concerning the establishment and development of Trans-European energy networks are not subject to this investigation.

25 Kahl, in EuR 2009, p. 601 at p. 606, where reference is made to footnote 33 – the most important editorial change is – as through the whole Treaty of Lisbon – the waiver of the terms “European law“ and “framework law“. Instead, there is just the speech of “measures“ to be adopted “under the ordinary legislative procedure“. Also the replacement of the word “needs“ by “necessity“ in art. 194 TFEU has no substantive change as a result in art. 194 para. 1 TFEU; overview of the changes in art. 194 TFEU to art. III-256 TCE at Ehricke/Hackländer, in ZEuS 2008, p. 579 at p. 582.

26 Gundel, in EWS 2011, p. 25.

27 Ehricke/Hackländer, in ZEuS 2008, p. 579 at p. 582.

2.2.4.1 Limits of the competences of the EU

The energy sector belongs to one of the shared competences according to art. 4 para. 2 lit. i) TFEU. To the same extent as the Union lawfully exerts its competence in accordance with the aforementioned principle of conferral according to art. 5 para. 1 s. 1, para. 2 TEU and the principles of subsidiarity and proportionality as defined in art. 5 para. 1 s. 2, para 3, para. 4 TEU the Member States lose their responsibilities in accordance with art. 2 para. 2 TFEU. The scope of the extent of the EU competences and the details of their exercise under the provisions relating to the single area of the Treaties are determined by art. 2 para. 6 TFEU. Aforementioned art. 4 para. 2 lit. i) TFEU is not in itself a legislative competence standard; instead the energy-specific competence standard of art. 194 TFEU is relevant, by whose para. 2 subpara. 1 the Union shall be empowered, to adopt the necessary measures to achieve their energy policy objectives. Art. 194 TFEU therefore represents both a task and competence allocation in favour of the Union.²⁸

Jurisdictional boundaries arise for the Union both for the aforementioned general principles of law mandatory to be observed as well as from art. 194 para. 2 subpara. 2 TFEU listed rights of the Member States, e.g. to determine the general structure of their energy supply.

2.2.4.2 Objectives and principles of art. 194 TFEU

The European energy policy focused before the occurrence of the primary legal target on the general consideration that the supply of energy has to be done as safe, affordable and environmentally friendly as possible.²⁹ The energy policy of the European Union is considered as a cross-cutting issue concerning the three main challenges of security of supply, climate change and competitiveness.³⁰ These targets were previously listed³¹, especially in non-binding Green and White Papers of the Union and are now anchored in the four objectives of art. 194 para. 1 TFEU.

²⁸ Ehrlicke/Hackländer, in ZEuS 2008, p. 579 at p. 586.

²⁹ Hobe, Europarecht, p. 341 para. 32.

³⁰ Communication from the Commission to the European Council and European Parliament – An Energy Policy for Europe, COM(2007) 1 final, p. 6.

³¹ Grunwald, Das Energierecht der Europäischen Gemeinschaften, p. 440 et seq.

The four objectives of art. 194 para. 1 TFEU include alongside the ensuring of energy supply, the promoting of energy efficiency and energy saving, the development of new and renewable energy sources and the promotion of the interconnection of energy networks, also the ensuring of the functioning of the energy market. Hereby, there are three principles prefixed to consider in the pursuit of the aforementioned objectives respectively in the context, which the energy policy has to pay attention to. One of these principles is the establishment or the functioning of the internal market, which will be shown below. While the term "internal energy market" only refers in a spatial sense on the territory of the Member States of the Union, the term "energy market" concerns the relevant market designated for the product energy without delimitation in spatial terms. So this therefore relates also to the territory of third countries and thus the Unions' internally cross-border issues.³² In contrast to the notion "internal market", which as a central objective and fundamental principle of the Union³³ primarily means a legal concept, the term "market" stands for a place, where supply and demand meet each other and is thus an economic term. The internal market comprises as a guiding principle according to its definition within the meaning of art. 26 para. 2 TFEU the four fundamental freedoms of movement of goods, persons, services and capital. These freedoms are "achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers".³⁴ "Delivery" in the context of this ongoing work is used interchangeably with the term "supply", which means "sale, including resale, of electricity to customers" in the sense of art. 2 no 19 Directive 2009/72/EC.

2.3 Competition in the energy sector and consumer protection

The introduction of competition in the gas and electricity markets of the EU is an integral part of European energy policy, that strives for three closely related objectives, namely a competitive and efficient energy sector, security of supply and sustainability; the Commission has all the powers conferred on the basis of antitrust law as well as merger control and state aid control to enforce EU competition law as effectively as possible.³⁵

32 Ehricke/Hackländer, in ZEuS 2008, p. 579 at p. 587.

33 Kahl, in Calliess/Ruffert, EUV/AEUV, art. 26 para. 14; Pipkorn/Bardenhewer-Rating/Taschner, in von der Groeben/Schwarze, EUV/EGV-Kommentar, art. 14 para. 1 et seq.

34 See Directive 2009/72/EC – recital (3).

35 Communication from the Commission – Inquiry pursuant to art. 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final, p. 3, 11.

The TFEU contained under the validity of the previous Community no exemption for the energy sector; therefore, after the introduction of art. 194 TFEU the general economic provisions of the TFEU are equally applicable to the energy sector.³⁶ Those include in particular the provisions on the free movement of goods (art. 34 et seq. TFEU), the antitrust rules (art. 101 et seq. TFEU), rules on the prohibition of aid (art. 107 TFEU) as well as the provisions for ensuring services of general economic interest (art. 106 para. 2, art. 14 TFEU). These areas are to be explained also with regard to consumer protection from the viewpoint of the internal energy market subsequently.

2.3.1 Free movement of goods, art. 34 et seq. TFEU

Prerequisite for a functioning internal market is, among other things, also to ensure the free movement of goods. With regard to the question, whether electricity is to qualify as a commodity and thus the rules of free movement of goods within the meaning of art. 34 et seq. TFEU are applied, or whether reference is made to the so-called freedom to provide services within the meaning of art. 56 et seq. TFEU, the ECJ has always referred to the so-called free movement of goods.³⁷ For this purpose also speaks the wording of art. 122 para. 1 TFEU, which empowers the EU to take preventive measures, if “severe difficulties arise in the supply of certain products notably in the area of energy”. The applicability of any of the aforementioned rules on the freedom to provide services is excluded insofar as this belongs to the object of the mere supply of electricity. In contrast referring to the network operation and additional services in the energy distribution the service character lies in the foreground³⁸ with the result of compliance with the rules on the freedom to provide services.

Quantitative restrictions on imports and exports of electricity as well as so-called "equivalent

36 Schneider, in Schneider/Theobald, *Recht der Energiewirtschaft*, § 2 p. 48 et seq. para. 12; Jarass, *Europäisches Energierecht*, p. 14 et seq., p. 65 et. seq., p. 81 et seq.; Lecheler/Recknagel, in Dausen, *EU-Wirtschaftsrecht*, para. 5, 42.

37 ECJ, C-393/92, *Almelo* (27/4/1994), E.C.R. I-1477, para. 27 et seq.; see also art. 3 para. 3 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council - Consumer Rights Directive, OJEU L 304, 22/11/2011, p. 64 et seq., after which, inter alia, electricity and gas shall be considered as goods within the meaning of this Directive, where they are put up for sale in a limited volume or a set quantity.

38 Lecheler/Recknagel, in Dausen, *EU-Wirtschaftsrecht*, para. 9, 11.

effects", which are "capable of actually or potentially hindering intra-community trade in electricity directly or indirectly"³⁹, are in accordance with art. 34 et seq. TFEU prohibited between Member States. Nevertheless national restrictions on the freedom of movement of goods can be justified under the exception rule of art. 36 TFEU e.g. for the protection of health. In addition to this aforementioned legal justification unwritten justifications for the judicially developed "Cassis" principles can be possible, "if the trade barriers for compelling reasons of general interest are required".⁴⁰ To the mandatory requirements recognized by the Court after the "Cassis de Dijon" decision belongs also the consumer protection standing in the focus of this work; misleading of consumers should be prevented.⁴¹ The ECJ could not determine such mandatory requirements based on the public interest in the so-called "Cassis de Dijon-case" in favour of the FRG, which relied on the protection of health and the protection of consumers against unfair competition, and therefore classified the German legislation as a prohibited measure of having equivalent effect, which is incompatible with the European fundamental freedom of the free movement of goods.⁴²

2.3.2 Antitrust law, art. 101 et seq. TFEU

The Union shall have exclusive jurisdiction in determining the required competition rules for the functioning of the internal market pursuant to art. 3 para. 1 lit. b) TFEU, whose observance and enforcement as part of the ongoing European electricity market are both of central importance. According to art. 119 para. 1 TFEU in conjunction with art. 3 TEU the Union together with the Member States is responsible to protect the competition in the internal market and is committed to the principle of an open market economy with free competition supporting consumer protection as shown in the following part 2. Therefore, the European Union plays the role of a guardian exercised by the Commission in relation to the Member States and market participants to ensure free

39 ECJ, C-8/74, Dassonville (11/7/1974), E.C.R. 837, para. 5 - thereafter such trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade, are to be considered as measures having an effect equivalent to quantitative restrictions.

40 ECJ, C-120/78, Cassis des Dijon, (20/2/79), E.C.R. 649, para. 8, 14.

41 Becker, in Schwarze EU-Kommentar, art. 30 EGV para. 45; Dausen, in EuZW Heft 14-15/1995, p. 425.

42 Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 405 para. 43; Hobe, Europarecht, p. 188 para. 103 – in addition to the aforementioned legal interests the environmental protection has been recognized as an additional mandatory requirement; later the health protection was taken out of the scope and assigned explicitly to art. 36 TFEU.

competition in the internal market.⁴³ In terms of companies operating in the energy sector this relates particularly to the provisions on prohibition of cartels (art. 101 TFEU), the prohibition of abuse of a dominant market position (art. 102 TFEU) and merger control (EC Merger Regulation 139/2004/EC in conjunction with Commission Regulation 802/2004/EC⁴⁴). Due to the internal market, which is fragmented into national markets and therefore does not work as a single market yet, there are still many barriers to an open and fair competition; most of the energy markets remain national in scope with a high degree of concentration, where incumbents often hold a de facto monopoly position.⁴⁵ Market concentration has proved to be a major obstacle for the success of the liberalization process; the intervention of the Commission on the basis of the Merger Regulation⁴⁶ is therefore essential to avoid a further deterioration of the competitive structure of the relevant markets.⁴⁷

2.3.3 Aid law, art. 107 et seq. TFEU

The state aid rules (art. 107 et seq. TFEU), which also represent as competition rules an important area of European competition law can be relevant in the energy sector based on the financial relief of certain energy-intensive industries of individual Member States in particular in connection with the promotion of renewable energy as well as in the framework of partial or total exemption from payment network charges as it is, for example, carried out in the FRG. This regulatory area belongs under art. 3 para. 1 lit. b) TFEU equally to the exclusive competence of the EU.

The focus lies on the question of the admissibility concerning the exemption of certain industries of network fee payments to the network operator in return for the use of the energy networks from the perspective of state aids, as this is practised in FRG. This relief or exemption of industrial

43 Hobe, Europarecht, p. 264 para 365.

44 Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJEC L 133, 30/4/2004, p. 1 et seq.

45 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy 2020 - A strategy for competitive, sustainable and secure energy, COM(2010) 639 final, p. 9.

46 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings - the EC Merger Regulation, OJEC L 024, 29/1/2004, p. 1 et seq.

47 Communication from the Commission - Inquiry pursuant to art. 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final, p. 9.

wholesalers as large electricity customers alike has resulted a corresponding economic overhead by increasing the network charges also to the detriment for consumers, who have to finance this relief. The third antitrust division of the court of appeal of Düsseldorf has asked the Commission on 27 August 2012 as part of summary proceedings in terms for a decision, whether the European Commission considers such an exemption for energy-intensive businesses as a state aid within the meaning of art. 107 para. 1 TFEU; in the meanwhile, the European Commission has launched a detailed inquiry to determine whether the liberation of large electricity customers of network charges in FRG since 2011 is considered as state aids.⁴⁸ Should this be the case the Commission would consider whether such an exemption lead to excessive distortions of competition in the EU or such aid could possibly be justified.

Also under scrutiny is the question of whether the compensation mechanism of the renewable energy act⁴⁹ for energy-intensive companies in the FRG constitutes State aid. The General Directorate for Competition of the European Commission has opened a state aid procedure against FRG.⁵⁰ The method involves the liberation mechanism of the EEG-surcharge for electricity-intensive businesses. By the EEG the current generated electricity from renewable energy sources is privileged insofar as the producers receive a fixed feed-in tariff over a fixed period of 20 years, which is significantly above the market price. About the so-called burden sharing the aforementioned economic privilege is financed through the solidarity of electricity consumers, wherein certain power-intensive industries portions are relieved of this assessment. The financial relief by such an exemption also affects on consumers insofar, as they will

48 OLG Düsseldorf (AZ. VI – 3 Kart 65/12 (V) and VI – 3 Kart. 14/12 (V)) on 27/8/2012; press release OLG Düsseldorf No 29/2012 on 6/9/2012 – Exemption of electricity-intensive companies of network charges contrary to European law ?; European Commission – IP/13/191 (6/3/2013) – State aid: Commission opens in-depth inquiry into potential aid for large electricity consumers exempted from network charges in Germany.

49 Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien (Erneuerbare Energien-Gesetz 2012 - EEG) vom 4. August 2011 (BGBl. I No 42, p. 1634).

50 Press release Bund der Energieverbraucher e.V. (5/6/2012) – EU opens state aid proceedings for relief of large industry customers from the EEG. See also Commission Decision (18/12/2013) concerning “State Aid SA.33995(2013/C)(ex 2013/NN) – FRG Promotion of electricity produced renewable energy sources and limitation of the EEG surcharge for energy intensive companies“, C(2013) 4424 final, p. 61 “final conclusions (German version)“, after which the Commission currently has doubts as to the compatibility of the support mechanism for electricity from renewable energy sources as well as to the compatibility of the limitation of the EEG surcharge for energy intensive companies with the TFEU; see also Communication from the Commission - Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU, COM(2014) XXX, p. 16 no 66 – in accordance with that surcharges imposed by law on private persons can be qualified as State resources. This is the case even where a private company is appointed by law to collect such charges on behalf of the State to channel them to the beneficiaries without allowing the collecting company to use the proceeds from the charges for purposes other than those provided for by the law.

be charged in the amount of financial relief of the industry through a corresponding increase of the levy, which is financed by the consumers as well. This procedure differs from that in force in the years 1999/2000 StromEinspG⁵¹, that only regulated in contrast to the aforementioned EEG the redistribution of the costs incurred due to the feeding of electricity into the grid without such additional relief. According to the ECJ this mere remuneration for feeding is not considered as a constitute state aid within the meaning of art. 92 of the EC Treaty (now art. 107 TFEU).⁵²

The review of state aid on their admissibility and thus compatibility with European law, which serves to guarantee an undistorted competition, pursues the goal of protecting competition indeed; but will, however, immediately due to the aforementioned economic impact indirectly also effect the interests of consumers.

2.3.4 Services of general economic interest, art. 106 para. 2, art. 14 TFEU

Services of general economic interest, internal market and Community competition policy are not incompatible, but complementary in the pursuit of the fundamental objectives of the Treaties insofar as these three elements must work together so that both the individual citizens and society as a whole benefit from it.⁵³ They differ from ordinary services in so far that they need to be provided even where the market may not have sufficient incentives to do so.⁵⁴

51 Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Stromeinspeisungsgesetz) vom 7. Dezember 1990 (BGBl. I p. 2633).

52 ECJ, C-379/98, Preussen Elektra, (13/3/2001), E.C.R. I-2099, para. 66; see also Communication from the Commission - Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU, COM(2014) XXX, p. 16 no 64, where reference is made to the Case “Preussen Elektra“ under footnote 94 – after that an obligation imposed by a Member State on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not entail the direct or indirect transfer of State resources to undertakings, which produce that type of energy.

53 Communication from the Commission – services of general interest in Europe, COM(2000) 580 final, p. 5.

54 Communication from the Commission – services of general interest in Europe, COM(2000) 580 final, p. 9.

2.3.4.1 Statutory derogation, art. 106 para. 2 TFEU

To the aforementioned European competition and state aid rules there is a statutory exemption provision, which is codified in art. 106 para 2 TFEU since the entry into force of the Lisbon Treaty. So public undertakings and undertakings, to which Member States grant special or exclusive rights (art. 106 para. 1 TFEU), are released especially from the duty enshrined in art. 107 para. 1 TFEU to comply with the state aid rules as well as business-related provisions of art. 101, 102 TFEU, if the requirements of this statutory derogation are met.

The term "services of general economic interest" is neither defined in art. 106 para. 2 TFEU nor in art. 14 TFEU. Therefore, it requires a definition of both the term "services of general interest" and the term "services of general economic interest".

2.3.4.1.1 Services of general interest

Services of general interest are those, that are classified by the authorities of the Member States as lying in the general interest and are therefore subject to specific public service obligations; the term covers both economic and non-economic services, whereby the latter being subject to neither EU law nor internal market and competition rules of the Treaty⁵⁵ and are not part of this study.

2.3.4.1.2 Services of general economic interest

Services of general economic interest are economic activities, that serve the public good and would not be carried out at all without governmental intervention in the market or performed in terms of quality, safety, affordability, equal treatment or universal access only to other standards; the public service obligation is imposed by way of an order to the service provider, that contains a public good component, thus ensuring that the service is provided under conditions, that allow the service provider to fulfill its mission.⁵⁶ The Commission considers that this term therefore refers to

55 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - a quality framework of services of general interest in Europe, COM(2011) 900 final, p. 3.

56 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - a quality framework of services of general interest in Europe, COM(2011) 900 final, p. 4 et seq.

economic activities, that are connected by the Member States or the Union to specific public service obligations and applies to the criterion, that they are performed in the public interest; the concept of services of general economic interest therefore includes certain services of the big network industries, particularly in the energy as well as the telecommunications sector, and includes any other economic activity, which is subject to public service obligations.⁵⁷

Based on the energy sector, the respective Member State regulatory regime is an effective corrective necessary to enforce public policy objectives against the competition and to counter the risk of market failure in time; Member States contribute to achieve these objectives through their national regulatory authorities, in particular to ensure a security of energy supply in the public interest. Regulation therefore means the state efforts to achieve the common interest in those sectors, where services are not provided by the state but by private and where nevertheless there is a particular public interest in the provision of these services.⁵⁸ State regulatory measures should counteract excessive charges in the form of price regulation on the one hand and allow a functioning competition in the context of access regulation on the other hand. The energy-specific regulatory law is presented in detail in part 3 under 4.4.

According to art. 106 para. 2 TFEU the provisions of the Treaties in particular the competition rules apply for undertakings, which are entrusted, among other, with services of general economic interest, only insofar as the application of such rules does not obstruct the performance of the particular tasks legally or factually; art. 106 para. 2 TFEU constitutes a statutory exception to the rules on competition in the presence of the aforementioned conditions, which must be interpreted strictly.⁵⁹ The regulation allows a breaking of the competition regime and is therefore at the interface between state and market.⁶⁰

57 Green Paper on services of general interest, COM(2003) 270 final, p. 7; Khan, in Geiger/Khan/Kotzur, EUV/AEUV, art. 106 para. 13.

58 Britz, in Die Verwaltung 2003, p. 145.

59 Kühne, in RdE 2002, p. 257 at p. 258.

60 Schmidt, in Der Staat 2003, p. 225 at p. 226.

2.3.4.2 Distribution of competences, art. 14 TFEU

Art. 14 TFEU addressed both the Union and the Member States and regulates the distribution of their competences, without being a competency standard itself; this norm aims to ensure the functioning of services of general economic interest. Services of general economic interest in the European Union legal order have an independent value, which is to claim to the basic decision for a competitive but social and thus instrumental in the service of the people identified market economy (art. 3 para. 3 TEU); the Union meets in this respect the obligation to determine a competition framework, which is compatible with the general interest.⁶¹ The Union and the Member States have powers to act in relation to companies orientated in public welfare; as a non-exclusive competence of the Union, the Member States are protected by the principle of subsidiarity in their basic freedom for the political formation in the field of services of general interest.⁶² Thus, the Union and the Member States have to take care in accordance with art. 14 s. 1 TFEU in the framework of their respective powers to ensure that the principles and conditions in particular of economic and financial kind are designed for the functioning of these services in a way that they can carry out their duties; this has to be done without prejudice to art. 4 TEU and art. 93, 106 and 107 TFEU and in the view of the significance given to the services of general economic interest in the shared values of the Union as well as their importance in supporting the social and territorial cohesion in the framework of their respective powers and within the scope of the application of the Treaties.

The term "services" in the sense of art. 14 TFEU has no significance difference on the notion "services" under art. 106 para. 2 TFEU; the terminology used in art. 14 TFEU intended only a clarification regarding the fact that not only services within the meaning of art. 56 et seq. TFEU are meant.⁶³ The newly by the Treaty of Lisbon in the primary law also introduced protocol no 26 on services of general interest⁶⁴ complies largely with the requirements of art. 14 TFEU.⁶⁵ Similar to the protocol no 26, art. 36 Charter of Fundamental Rights (CFR)⁶⁶ is directed in its basic trend at

61 Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 14 para. 4.

62 Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 14 para. 6.

63 Jung, in Calliess/Ruffert, EUV/AEUV, art. 16 para. 8.

64 Protocol on services of general interest, OJEU C 306, 17/12/2007, p. 158; last consolidated version: Protocol (No 26) on services of general interest, OJEU C 83, 30/3/2010, p. 308.

65 Schorkopf, in WiVerw 2008, p. 253 at p. 257 et seq.

66 Charter of Fundamental Rights of the European Union, OJEU C 303, 14/12/2007, p. 1 et seq.

restricting the competences of the Union with the requirement that the provision of essential services lies in the freedom of the Member States as far as they do not run contrary to the purpose of the Treaties.⁶⁷ According to art. 6 para. 1 TEU the CFR is in the range of primary legislation, wherein art. 36 CFR does not create any new right.

2.3.4.3 Services of general economic interest from the viewpoint of the electricity sector - interface to consumer protection

The energy industry represents a classical field of public service performance, which is for example assigned in FRG for the so-called "general interest" and in France associated with the regime of "public service".⁶⁸ Companies, whose main tasks are to ensure a reliable and fully functioning, comprehensive public electricity supply at the lowest possible cost and in a socially acceptable manner, providing services of general economic interest.⁶⁹ In terms of specifications for the design of these services carried out by the Union in particular by Directive requirements the Member States have discretion in the process of implementing. The discretion of the Member States in the exercise of tasks in the public welfare includes on the basis of the jurisprudence of the ECJ expressly also the duty to derogate from the design of the regulatory framework for such a task perception from the competition principle.⁷⁰ So, for example contractual arrangements for the prevention of electricity imports as well as for an obligation of an exclusive power purchase by local from regional utility companies⁷¹ likewise as cross-subsidization non profitable by profitable service segments can be allowed to the fulfillment of tasks assigned to monopoly undertakings.⁷² Because the liberalization of the electricity sector does not always presupposes effective competition, required restrictions on competition on network services to operators of natural network monopoly as services of general economic interest have to be considered to protect consumers in each individual case also taking

67 Schmahl, in GewArch Beilage WiVerw No 02/2011, p. 96 at p. 107.

68 Koenig/Kühling/Rasbach, in ZNER 2003, p. 3 at p. 5.

69 ECJ, C-159/94, Commission v. France (23/10/1997), E.C.R. I-5815, para. 59 et seq.; Baur, in RdE 1999, p. 85 at p. 86.

70 Kühne, in RdE 2002, p. 257 at p. 259.

71 ECJ, C-393/92, Almelo (27/4/1994), E.C.R. I-1477, para. 51.

72 ECJ, C-320/91, Corbeau (19/5/1993), E.C.R. I-2533, para. 17; ECJ, C-340/99, TNT Traco (17/5/2001), E.C.R. I-4109, para. 55; Kühne, in RdE 2002, p. 257 at p. 258 et seq.

into account the principle of proportionality. The gradual opening of the electricity sector as a network based sector to competition goes hand in hand with the definition of a number of relevant public service obligations, to which the universal service obligation as general universal service as well as the consumer protection belongs.⁷³ Therefore, in the exercise of the existing Member State margin of discretion common European values and objectives are taken into account including in addition to the security of supply, the value of the supply as well as consumer protection. As beneficiaries the European citizens as consumers expect highly quality services at affordable prices.⁷⁴

2.4 Interim conclusion

With the Treaty of Lisbon and the accompanying art. 194 TFEU the Union has established a comprehensive legal basis for the energy sector and thus explicitly acknowledged the importance of the energy sector at European level. The Union receives for the first time its own internal market competence related to the energy sector. Based on this in art. 194 para. 1 lit. a) TFEU anchored target to "ensure the functioning of the energy market" in the context of the establishment and functioning of the internal market the idea of an European competition is to be considered immediately. To ensure, among other things, also in favour of consumers a secure energy supply at affordable prices in the future a competitive internal energy market should be created. Fostering competition through the observance of the competition rules by energy companies and, if necessary, its enforcement on the basis of the requirements of the Union as well as its own regulatory and antitrust actions by the Member States is an indispensable part of a completed internal energy market. In particular the Commission will continue to apply in the future antitrust as well as legal aid regulations in the energy sector to ensure such barriers to competition, which were eliminated by the regulation already, will not be recreated through measures by companies or agencies, that lead to market distortions.⁷⁵

73 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Accompanying the Communication on "A single market for 21st century Europe", COM(2007) 725 final, p. 6.

74 Communication from the Commission – services of general interest in Europe, COM(2000) 580 final, p. 7.

75 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 8.

Since, however, competition solely due to lack of market incentives cannot ensure a proper provision of public services through energy supply companies in the public interest and thus also for the protection of consumers the companies are required by the Member States in particular through regulatory measures to fulfill their services of general economic interest properly. Therefore, the Union is committed under art. 14, 106 para. 2 TFEU and art. 36 CFR to ensure the operation of services of general economic interest, which includes the possibility of regulating correction of competition to protect otherwise vulnerable consumer interests.⁷⁶ The energy sector-specific framework regulates the level of state regulatory powers, in which the national regulatory authorities play a special role.⁷⁷

In compliance with the principle of proportionality regulated competition restrictions may be required if necessary to protect consumers. This applies in particular to the security of supply by an obligation to a comprehensive European universal service. The provisions of services of general economic interest and the development of the European internal market do not exclude each other. They complement each other as the investigation of sectoral rules on the example of grid-based electricity sector in part 3 of this work occupies.

Effective competition is beneficial for consumers because of price reductions through appropriate cost pressure. In a functioning market the consumers have the market power to ensure that the terms and conditions are designed consumer-friendly.⁷⁸ Functioning competition, to which consumers contribute on the one hand and equally participate on the other hand, and ensuring of consumer protection are in an immediate factual context; they are really in a mutual relationship with each other. Occasionally, competition is therefore also known as "the consumers' best friend".⁷⁹

76 ECJ, C-320/91, Corbeau (19/5/1993), E.C.R. I-2533, para. 14; ECJ, C-159/94, Commission v. France (23/10/1997), E.C.R. I-5815, para. 98; Hellermann, in VVDStRL Bd. 70 (2011), p. 366 at p. 376.

77 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Accompanying the Communication on "A single market for 21st century Europe", COM(2007) 725 final, p. 6.

78 Nitsche/Thielert, in WuW 2004, p. 250 at p. 252.

79 Von Hippel, Verbraucherschutz, § 5 p. 146.

2.5 Development of the European secondary legislation by the example of Directive 96/92/EC, Directive 2003/54/EC, Directive 2009/72/EC

In light of the objective set out in 1985 of creating a single European market in 1992 without internal frontiers the opening up of the market in the energy sector was much later than in other economic sectors.⁸⁰ Until the beginning of the liberalization of the European energy market and thus opening the sector to competition it was up to the Member States to ensure through national energy companies, partly as state structured partly in private law vertically integrated monopolies, which combined all of the value chain, i.e. production (art. 2 no 1 Directive 2009/72/EC), transmission (art. 2 no 3 Directive 2009/72/EC), distribution (art. 2 no 5 Directive 2009/72/EC) and supply (art. 2 no 19 Directive 2009/72/EC) of energy in itself, a comprehensive, secure energy supply. Energy markets were hitherto generally considered legally by the competition excluded areas.⁸¹

Due to many existing specialities of the energy sector as natural monopolies of networks with the sectors transport and distribution different structural conditions with regard to the organization of the energy sector within the Member States as well as the homogeneity of the product electricity, where consequently no differentiation and thus no competition in the ratio of quality to price exists, liberalization is a major challenge. Acts on the internal energy market as in 2009 the "Third Internal Energy Market Package" were based on the Treaty establishing the European Community and in particular on art. 95 of the EC Treaty (now art. 114 TFEU). As the energy sector due to its characteristics, however, can not be so simply liberalized as typical products its inclusion in the domestic market is to a significant extent dependent on secondary legislation.⁸²

The development of the main provisions of the secondary legislation for the internal energy market, which is in the range under primary law and shall be interpreted in its light, will be shown below by the example of Directive 96/92/EC⁸³, Directive 2003/54/EC and Directive 2009/72/EC in particular

80 Communication from the Commission to the European Parliament and the Council – completing the internal energy market, COM(2001) 125 final, p. 2.

81 Von Danwitz, in Energy Law Journal 2006, p. 423 at p. 425.

82 Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 412 para. 7.

83 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJEU L 027, 30/01/1997, p. 20 et seq.

from the perspective of the new unbundling requirements as one of the basic conditions for effective competition.

Out of consideration remain such regulations regarding in particular the monitoring of energy trading as well as external aspects and accompanying acts of the Union. Also not treated at this point will be the consumer protection, which is now listed in contrast to Directive 96/92/EC in the Directive 2003/54/EC for the first time as a general objective explicitly⁸⁴ and is updated accordingly in the Directive 2009/72/EC, in which the interests of consumers are at the centre.⁸⁵ A detailed description in this regard is carried out in part 2 and in particular in part 3 as part of a comparison between Directive 2003/54/EC and its subsequent Directive 2009/72/EC.

2.5.1 Directive 96/92/EC

The Directive 96/92/EC adopted on 19 December 1996, which came into force on 19 February 1997 as part of the so-called "First Internal Energy Market Package" and has to be implemented until 1999, contained the first regulations for the liberalization of the European electricity market for electricity generation, network operations, the use of production facilities and the possibility of the free supply of electricity customers, where the central regulation of so-called "third party network access" was created; these provisions have been supplemented by a prohibition of discrimination for network operators and the obligation to separate the production activities from the sales and network operations, so-called "unbundling".⁸⁶

According to Directive 96/92/EC the establishment of a competitive electricity market is an important step towards completing the internal energy market.⁸⁷ Furthermore, the realization of the internal market in electricity is particularly important; it is important, while reinforcing security of supply and the competitiveness of the European economy as well as respecting environmental

84 Directive 2003/54/EC – recital (26), art. 3 para. 9; Directive 96/92/EC – recital (13) refers to the ensuring of consumer protection only in the context of the imposition of public service obligations by Member States as far as free competition left to itself cannot necessarily guarantee such protection.

85 Directive 2009/72/EC – recital (51).

86 Däuper, in Danner/Theobald, *Europäisches Energierecht*, Bd. 2 Einf. B para. 28.

87 Directive 96/92/EC – recital (2).

protection to increase the efficiency in the production, transmission and distribution of this product.⁸⁸ Agreement existed that the realization of the internal market for energy has to be done gradually, in order to enable the energy industry to adjust in a flexible and ordered manner to its new environment; it has to be considered that the electricity systems are currently organized in different ways.⁸⁹

Already from the aforementioned recitals of the Directive 96/92/EC it is clear that this Directive represents a first tentative step and compromise, that had to take into account the different market structures of the Member States and thus in particular also differing organizational structures of Member State energy industries. This shows also that the Member State granted network access options, which according to art. 16 et seq. Directive 96/92/EC had to be implemented for the benefit of third parties without discrimination in accordance with transparent and objective criteria and for which there was a choice in favour of the Member States. Accordingly, there was the option of a negotiated network access according to art. 17 para. 1 Directive 96/92/EC on the one hand and of a regulated network access based on published and approved network charges under art. 17 para. 4 Directive 96/92/EC on the other. Finally, the so-called single buyer model under art. 18 Directive 96/92/EC was in favour of the Member States based on the option to designate a company related to a single buyer status to a particular network area, which settled all delivery transactions. The latter network access model represented a concession to Member States such as France, where a single "state enterprise" solely responsible for the energy supply already exists. The implementation of a variety of important areas of the Directive requirements remains in the discretion of the Member States; this refers in particular to the speed of market opening under art. 19 Directive 96/92/EC.

Overall, the Directive represents a cautious beginning and a first step towards market opening. With numerous compromises on the one hand and the provision of a wide Member State discretion in the implementation of the Directive requirements on the other hand it takes appropriately into account the partly considerable structural differences concerning the energy industries organized by the Member States.

88 Directive 96/92/EC – recital (4).

89 Directive 96/92/EC – recital (5).

Despite the progress achieved the Directive 96/92/EC could not meet the community expectations placed on it. There were still serious shortcomings and far-reaching ways to improve the functioning of markets and further gradual implementation of liberalization.⁹⁰

2.5.2 Directive 2003/54/EC

The Directives of the so-called "Second Internal Energy Market Package", including as an integral part Directive 2003/54/EC, announced on 15 July 2003 and came into force on 4 August 2003, were called "Acceleration Directives" because they pursue the objective of accelerating the efforts to liberalize markets based on past rather slow progress and thus impending restrictions on competition.

Aforementioned Directive 2003/54/EC should be implemented by Member States until 1 July 2004, whereas the Member States had the opportunity to postpone the implementation of the so-called "legal unbundling" of the distribution system operators within the meaning of art. 2 no 6 Directive 2003/54/EC until 1 July 2007.⁹¹ Notwithstanding this, the unbundling of transmission system operators in the form of the legal unbundling had to be made without delay.⁹²

In contrast to the previous Directive 96/92/EC Member States should ensure on the basis of Directive 2003/54/EC network customers such as electricity traders a non-discriminatory and by objective criteria determined network access based on a so-called "ex-ante regulation", where the network access charges or the methods of determination must be approved in advance by the competent regulatory authority and had to be published by the network operators.⁹³ The Directive obliges Member States to establish national regulatory authorities independent from the interests of the energy industry.⁹⁴ For in the opinion of the Community the major obstacle to a fully operational and competitive internal market relates to issues of network access, tarification issues and different

⁹⁰ Directive 2003/54/EC – recital (2).

⁹¹ Art. 30 para. 2 in conjunction with art. 15 para. 1 Directive 2003/54/EC.

⁹² Art. 10 Directive 2003/54/EC – the so-called “owner-ship“ unbundling, however, was not required.

⁹³ Art. 10 Directive 2003/54/EC; Schneider/Prater, in RdE 2004, p. 57 at p. 60.

⁹⁴ Art. 23 para. 1 Directive 2003/54/EC, where the tasks of the regulation authorities are listed in para. 2 - 12.

degrees of market opening between Member States.⁹⁵ To remove existing obstacles of network access Member States are obliged to grant the right of access to the network all non-household customers until 1 July 2004 and all other customers until 1 July 2007.⁹⁶

Before the expiry of that implementation deadlines of the "Second Internal Energy Market Package" with the full opening of the electricity and gas markets the Commission stated that the European Union was still far from the goal of a true internal energy market.⁹⁷ As main reasons have been identified the fragmentation along national markets, a high degree of vertical integration, i.e. the insufficient separation of the network sector as a natural monopoly from the competition areas generation and sales and a accompanying high market concentration.⁹⁸

2.5.3 Directive 2009/72/EC

The Directive 2009/72/EC entered into force as part of the "Third Internal Energy Market Package" on the 3 September 2009 and had to be implemented by the Member States into national law until 3 March 2011. Aim of the current Directive 2009/72/EC is to correct the shortcomings, that still persisted after Directive 2003/54/EC.

2.5.3.1 Unbundling requirements for transmission system operators

2.5.3.1.1 Hindering of competition by existing market power

A mandatory requirement for the creation of a competitive internal energy market is the reduction of still existing historically grown market concentrations of individual and still existing vertically integrated energy companies in the sense of art. 2 no 21 Directive 2009/72/EC, which act anti-competitive on the basis of their market power in particular by hindering of network access and thus

⁹⁵ Directive 2003/54/EC – recital (5).

⁹⁶ Art. 21 para. 1 Directive 2003/54/EC.

⁹⁷ Communication from the Commission to the Council and the European Parliament - Prospects for the internal gas and electricity market, COM(2006) 841 final, p. 6 et seq.

⁹⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (presented by the Commission), COM(2007) 528 final, p. 2.

run counter to the objective of an effective competition as a condition of a progressive internal energy market. The Commission notes in its report for 2009 on the progress in creating the internal gas and electricity market that despite a slight tendency to lower this concentration it is still high in many national markets.⁹⁹

2.5.3.1.2 Need for effective unbundling - three models

The Union believes the current regulations with respect to a functional and legal unbundling will not lead as defined to an effective unbundling of transmission system operators in the meaning of art. 2 no 4 Directive 2009/72/EC, and without an effective unbundling there is an inherent risk of discrimination in the operation of the network as well as in terms of providing incentives for investments in networks of vertically integrated companies; only the removal of incentives for vertical integrated companies to discriminate against competitors as regards network access and investment can ensure effective unbundling.¹⁰⁰

Therefore, to eliminate the aforementioned obstacles regulations on the operation of the transmission system were enshrined in the Directive 2009/72 with three unbundling options, namely the so-called "ownership unbundling", art. 9 Directive 2009/72/EC, the model of the so-called "independent system operator - ISO", art. 13 Directive 2009/72/EC and the so-called "independent transmission operator - ITO", art. 17 Directive 2009/72/EC.

2.5.3.1.2.1 "Ownership unbundling model"

Where the Member State opts for the implementation of by the majority of Member States and the European Commission preferred model of ownership unbundling, there is to carry out a genuine structural separation between network activities and the business areas of production and distribution according to art. 9 Directive 2009/72/EC; the Member States have to ensure in this case that the network operation and the property of the network are belonging to one company and that natural or legal persons, who are at the same time controlling shareholders of an undertaking

⁹⁹ Communication from the Commission to the Council and the European Parliament - Report on the progress in creating the internal gas and electricity market, COM(2010) 84 final, p. 7.

¹⁰⁰ Directive 2009/72/EC – recitals (5), (9), (11).

performing any of the functions of generation and supply, neither exert direct nor indirect control over the network operator.¹⁰¹ Through this form of unbundling under the current legal framework existing discrimination incentives concerning e.g. in terms of the network connection and access can be in the opinion of the Community legislature eliminated because the operator will pursue exclusively the interests of one system operator.¹⁰²

2.5.3.1.2.2 "ISO model"

In the case of a decision by a Member State in favour of the "ISO model" as an alternative to the aforementioned model of ownership unbundling the transfer of network operations is carried out at the proposal of the transmission system owner to an independent system operator designated by the Member State. The designation of the independent system operator requires the consent of the Commission. In contrast to the aforementioned model the ownership of the transmission network of the vertically integrated company within the meaning of art. 2 no 21 Directive 2009/72/EC remains with the affiliated unbundled previous network owner according to art. 14 Directive 2009/72/EC. Therefore a trustee¹⁰³, who is independent of the interests of the network owner in particular in relation to production and distribution, is responsible for the entire network operation.

2.5.3.1.2.3 "ITO model"

Finally, Member States have the possibility to opt for the so-called "ITO model" as a third unbundling option. This model records as a sort of "unbundling light version" and compromise in the interests of several Member States such as France in particular on the basis of in the previous Directive 2003/54/EC already existing provisions on operational and legal unbundling; the independence of the subsidiary as a transmission system operator by the vertically integrated company is also strengthened, since the transmission system operator has to take care to exclude a danger of a confusion particularly in relation to corporate identity, communication and branding

¹⁰¹Däuper, in Danner/Theobald, *Europäisches Energierecht*, Bd. 2 Einf. B para. 39; Storr, in *EuZW* 2007, p. 232 et seq.; Büdenbender/Rosin, in *et* 8/2007, p. 20.

¹⁰²Däuper, in Danner/Theobald, *Europäisches Energierecht*, Bd. 2 Einf. B para. 39.

¹⁰³Säcker, in *et* 11/2007, p. 86 at p. 88 – the term “certified trust company” is chosen.

with regard to the own identity of the vertically integrated undertaking and of any part in the meaning of art. 17 para. 4 Directive 2009/72/EC. Whether this independence is ensured and thus the policy requirements are fulfilled is reviewed by the Commission within a period of two years from the date of the entry into force of the Directives, i.e. until 3 March 2013 according to art. 47 para. 3, 4 Directive 2009/72/EC. According art. 47 para. 5 Directive 2009/72/EC the Commission will set out in a detailed report the experiences with the "ITO model" and, where appropriate, submits proposals how deficiencies can be remedied¹⁰⁴ and thus a further year later, so until 3 March 2014, the effective independence of the TSO can be ensured.

2.5.3.2 Strengthening regulation at national and European level

The reorientation of regulation on national as well as European level represents a further focus of Directive 2009/72/EC. The expansion of regulatory powers is connected with the goal to ensure competition by removing existing competition deficits particularly competition hindering market power and the risk of disability in access to the network.

For, a non-discriminatory network access and an equally effective level of regulatory supervision is not guaranteed in all Member States yet; however, experience so far shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, insufficient powers and discretion.¹⁰⁵

2.5.3.2.1 Designation of a national regulatory authority - tasks

Art. 35 Directive 2009/72/EC stipulates as a central innovation that each Member State may only designate a single national regulatory authority in the future, which must be both completely independent from the interests of the electricity industry as well as legally separated in carrying out their regulatory tasks and functional independent of other public or private institutions. According to the opinion of the Union this is a requirement", so that the internal electricity market can function

¹⁰⁴Däuper, in Danner/Theobald, Europäisches Energierecht, Bd. 2 Einf. B para. 45.

¹⁰⁵Directive 2009/72/EC – recitals (4), (33).

properly”¹⁰⁶ Against this background a prerequisite to achieve those in art. 36 Directive 2009/72/EC fixed objectives of the national regulatory authority, which have to be carried out on the basis of the functions and powers listed in art. 37 Directive 2009/72/EC together with other responsible national competition authorities, is both the development of competitive and properly functioning regional markets as well as the promotion of a competitive, secure and environmentally sustainable internal electricity market in the EU. This includes according to art. 37 lit. j) Directive 2009/72/EC also to observe the degree and effectiveness of market opening and the level of competition at wholesale and retail levels inclusively electricity exchanges, the design and development of prices for household customers, prepayment systems, switching rates and disconnection rates as well as the household complaints and, consequently, potential distortions and limitations of competition. The regulatory authority shall contribute according art. 37 lit. n) Directive 2009/72/EC - as will be explained in part 3 under 4.4 in detail - with other relevant authorities that particular measures including the conditions laid down in Annex I Directive 2009/72/EC to protect consumers are effective and enforced.

2.5.3.2.2 Two new regulatory entities

In order to achieve a greater integration of national electricity and gas markets and to close the "regulatory gap" in cross-border issues the regulations of the “Third Internal Energy Market Package” provide two new regulatory entities, namely “ENTSO”¹⁰⁷ as a legally independent organization of transmission system operators as well as “ACER”¹⁰⁸ as a regulator at Community level.¹⁰⁹ According to art. 4 Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity all transmission system operators at Community level work together under the ENTSO in order to promote, among other things, the completion and functioning of the internal market in electricity and cross-border trade. The ACER has to ensure that the above mentioned regulatory functions are carried out by the national regulatory authorities well

¹⁰⁶Directive 2009/72/EC – recital (34).

¹⁰⁷European Network of Transmission System Operators (TSO) for Electricity/Gas (ENTSO) – it has to be built a TSO-network for the electricity- and gas-sector.

¹⁰⁸Agency of the Cooperation of Energy Regulators (ACER).

¹⁰⁹Däuper, in Danner/Theobald, Europäisches Energierecht, Bd. 2 Einf. B para. 52.

coordinated and supplemented, if necessary, at Community level.¹¹⁰ For regulatory issues, that affect cross-border interconnections and regional markets, should be perceived as one of the main targets of Directive 2009/72/EC to achieve the construction of a true internal electricity market based on a Community-wide interconnected network according art. 2 no 14 Directive 2009/72/EC by national regulatory authorities in close cooperation with ACER as the European Energy Agency.¹¹¹

2.5.3.3 Unbundling requirements for distribution network operators

Non-discriminatory access to the distribution network is a prerequisite for downstream access to the end customers within the meaning of art. 2 no 9 Directive 2009/72/EC; with a view to creating a level playing field at retail level activities of the distribution system operators in the meaning of art. 2 no 6 Directive 2009/72/EC - below referred to as the distribution network operator or service provider - should be monitored so that they are prevented from abusing their vertical integration to strengthen their competitive position particularly in relation to household and small non-household customers.¹¹² Therefore, Member States have also to make sure according to the revision of art. 26 para. 3 Directive 2009/72/EC that a distribution network operator does not use this circumstance as part of a vertically integrated company to the distortion of competition; for this purpose, vertically integrated distribution system operators have to ensure in their communication and branding activities that confusion is excluded in respect of the own identity of the supply branch of the vertically integrated undertaking.¹¹³ Because the existence of such a risk between vertically integrated network operators and vertically integrated companies associated supply divisions could lead to an unfair competitive advantage of this utility in relation to such utilities, that are not part of a vertically integrated utility company and thus penalize those utilities so far in their market activities, as energy customers may refrain from switching a supplier due to this existing confusion.

Such a threat of a disadvantage would be contrary to the principle of avoiding discrimination between energy suppliers through effective unbundling of the distribution system operator and thus

¹¹⁰ACER Regulation No 713/2009 – recital (6).

¹¹¹Directive 2009/72/EC – recital (59).

¹¹²Directive 2009/72/EC – recital (26).

¹¹³Lecheler/Recknagel, in Dausen, EU-Wirtschaftsrecht, para. 137; Boers, in N&R 2011, p. 16 at p. 19.

run counter to the European idea of workable competition without distortions.

Against the background of existing scope for interpretation in relation to the exclusion of such a danger of confusion it remains to be seen how Member State reaction takes place in this regard.

2.5.4 Interim conclusion

With the Member States' implementation of the regulated general entitlement of a network access enshrined in Directive 2003/54/EC a fundamental condition for the competition by a full opening of the market, which network operators have to provide to network customers to transparent grid access conditions and regulated network tariffs, was created. This in the course of the prescribed ex-ante regulation of network charges, which are to be published before demand of payment by the network operator, provides sufficient transparency for the benefit of network access petitioners and acts so competitive. However, existing competition deficits, that should be eliminated by the Directive 2009/72/EC, are also identified in the electricity sector as the study shows.

The unbundling requirements stated in Directive 2009/72/EC on transmission and distribution network operators level prevent potential risks of impediments or distortions of competition due to possible cross-subsidization within the framework of vertical integration. The establishment of two new regulatory bodies at European level as coordinating interfaces and brackets in relation to the Member State regulatory authorities represents another important building block to ensure a uniform as possible regulatory practice at Member State level and thus supports the objective of completing the internal energy market.

The new requirements promote the overall competition. They generally contribute to the elimination of already existing barriers to competition in various Member States. However, remains to be seen how the Directive is transposed in detail into national law.

The “Third Internal Energy Market Package” and thus the provisions of the Directive 2009/72/EC, which includes numerous new provisions, however, can not be considered as the final conclusion of the internal energy market¹¹⁴; this indicates already the proposal of an “Action plan of Europe” by

¹¹⁴Gundel/Germelmann, in EuZW 2009, p. 763 at p. 770.

the Commission to ensure the success of the internal energy market, with which all EU institutions, Member States and stakeholders are requested to work together towards the realization of those measures proposed in this action plan.¹¹⁵ Therefore the rules concerning regulation and liberalization, which are contained in the Directive, would have to be updated as quickly as possible in a subsequent Directive if the existing Directive does not produce the desired results in relation to the target of the completion of the internal energy market.

¹¹⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 21 Annex 1 “Action Plan for Europe“.

3 PART 2 - CONSUMER PROTECTION, LEGISLATIVE APPROXIMATION FROM THE PERSPECTIVE OF DIRECTIVE 2009/72/EC

Consumer policy is increasingly at the intersection of important challenges citizens, economy and society are facing; the service sector in general and the liberalized services in particular will continue to grow as the liberalization of the electricity, gas, postal and telecommunications markets develop further.¹¹⁶ To meet these challenges consumers need to have skills and tools to enable them to fulfill their role in the modern economy in “making markets deliver for them and in ensuring effective protection from the risks and threats they cannot tackle as individuals”.¹¹⁷

Consumer protection in the formal sense describes the reaction to a legal, economic and social phenomenon, which was analysed and managed by all industrial nations over the last four decades and which has now developed into a key issue with global claim.¹¹⁸ Consumer protection is a public legal right, that is in demand by all citizens; here one can speak of diffuse interests, which seeks to promote and protect Community law by competent state agencies or by appropriate organizations in the way of self help, i.e. in the form of enforcement of consumer rights.¹¹⁹ In terms of content consumer protection refers to all efforts and measures aimed at protecting people in their role as consumers of goods and services. This holistic approach includes not only consumer protection law measures, that are considered in this work exclusively, but in addition also measures such as education as well as consulting of consumers.

A functioning internal energy market competition, which requires both entrepreneurial freedoms and protection mechanisms in favour of the weaker market participant, is closely linked with effective consumer protection; because the consumers also contribute to the promotion of the internal energy market by being able to use their freedoms to develop in a functioning competition, to which they contribute by exploiting their possibilities and therefore benefit equally. The achievement of this

¹¹⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Consumer Policy Strategy 2007-2013, COM(2007) 99 final, p. 3.

¹¹⁷Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Consumer Policy Strategy 2007-2013, COM(2007) 99 final, p. 2.

¹¹⁸Lohmann, Verbraucherschutz und Marktprozesse, p. 25 et seq.; Gröner/Köhler, Verbraucherschutz in der Marktwirtschaft, p. 10 et seq. - remarks on the historical development of consumer protection.

¹¹⁹Reich, in Grundmann, Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, p. 503.

objective to ensure an undistorted competition as the basis of a functioning internal energy market, that has been presented in part 1 of this work, requires, among other things, an effective consumer protection.

The general development of European consumer protection law including reasons for its fragmentation at Member State level and opportunities for legislative alignment as well as its essential content from a primary legal point of view are represented in this part of the work. To avoid unnecessary duplications references to energy-specific consumer protection law of Directive 2009/72/EC are already made in this part of the work so far as such explanations prove to be a useful way for this in the following part 3 upcoming investigation of consumer protection regulations of Directive 2009/72/EC.

3.1 Development and objectives of European consumer protection law

3.1.1 Genesis

Due to the dynamic development of industrial society with rising commodity and service offerings associated with a flood of diverse informations towards consumers on the one hand and the ever increasing cross-border competition on the other hand consumer protection moved continuously in the viewpoint and thus the focus of the Community policy, which is documented by its historical development.

3.1.1.1 Consumer protection by establishing a common market

The TEEC of 25 March 1957¹²⁰, came into force on 1 January 1958, did not include an independent basis of competence for the area of consumer protection.¹²¹ This was initially "productivist", i.e. focused provider-oriented and directed in its institutions and legal structure primarily to producers

¹²⁰Treaty establishing the European Economic Community (TEEC), that leads to the founding of the European Economic Community (EEC) on 1 January 1958, signed on 25 March 1957 by Belgium, Italy, the Netherlands and FRG - BGBl. 1957 II, p. 766 et seq.

¹²¹Micklitz/Rott, in Dausen, EU-Wirtschaftsrecht, H.V. para. 8.

of economic value by making bigger production- and distribution-spaces available.¹²²

For this purpose a "common market" should be built, in which certain fundamental freedoms namely the free movement of goods and workers as well as services and capital should be ensured.¹²³ In this respect the understanding of integration corresponded to classic free-trade thinking - consumer welfare and quality of life should be set as the results of market freedoms of itself, if only certain conditions namely the openness of markets under a system of competition and non-discrimination existed.¹²⁴ The aim of the establishment of the common market was therefore primarily used as both preamble and art. 2 TEEC show to increase the quality of life of all market participants, which as a result would also benefit the consumer protection. However, this approach was not tenable; because for various reasons consumers could neither protect nor enforce their interests towards their market partners. This included both subjective, i.e. in the person of the consumer himself lying reasons such as inexperience, economic inferiority as much as in the sphere of the supply side lying causes especially intransparency of essential product informations as well as incomprehensible, surprising clauses. Without support the consumer was against the background of an ever wider range of products and, consequently, an ever wider choice of goods compared to the often overpowering provider in an increasingly vulnerable position and had to be therefore protected.

3.1.1.2 Action programme of the Community on consumer protection

The Commission therefore developed at the request of the EU Member States at their summit meeting in Paris in 1972 a Community action programme adopted on 14 April 1975 by the Council of the EEC as the first programme to protect and inform consumers¹²⁵ and thereby included "five fundamental rights"¹²⁶ to the protection of the consumer in the core namely the right to protect the

¹²²Micklitz/Rott, in Dausen, EU-Wirtschaftsrecht, H.V. para. 1.

¹²³Reich/Micklitz, Europäisches Verbraucherrecht, § 1 p. 14.

¹²⁴Micklitz/Rott, in Dausen, EU-Wirtschaftsrecht, H.V. para. 3.

¹²⁵Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJEU L 92, 25/4/1975, p. 2 et seq.

¹²⁶Von Hippel, Verbraucherschutz, p. 281 et seq. - the five rights (so-called "Kennedy-Rights") are based on the consumer rights of President John F. Kennedy in his "Special Message to the Congress on Protecting Consumer Interest" formulated consumer rights.

health and safety, protecting its economic interests, reparation of damage, right to information and education as well as representation and consultation, with which appropriate objectives and measures corresponded.¹²⁷ With the aforementioned programme a commitment to compliance with consumer interests was connected in different areas for the first time. By 1985 individual regulations were issued to ensure the fundamental freedoms such as the free movement of goods, in which consumer protection law interests also had to be considered. Despite this increased legislative activity in the late seventies and early eighties the Commission stated in its Communication to the Council only a slight progress in the field of consumer policy¹²⁸, which was also attributed, among other things, due to the lack of an own competence to protect consumers.

3.1.1.3 Art. 100 a of the TEEC – start of a new consumer protection age

As a turning point in the form of a new approach must be considered the introduction of the new art. 100 a of the TEEC¹²⁹ on 1 July 1987 by the Single European Act in the wake of the single market concept. Now, the new legislation allows the approximation of laws in the context of measures to complete the internal market with a mere qualified majority voting in the Council of Ministers and expressly oblige the Commission to assume a high level of consumer protection in its legislation.¹³⁰ This new approach including the abandonment of the previous unanimity had the consequence of both an improvement in relation to the protection of consumers and an acceleration relative to the adoption of relevant consumer protection legislation.

Through the implementation of numerous policies in the nineties, which were added to the already existing Directives 84/450/EEC¹³¹ concerning misleading advertising, the Doorstep Selling

¹²⁷Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJEU L 92, 25/4/1975, p. 2; Köhne/Günther, in VuR 2003, p. 288 at p. 289.

¹²⁸Report from the Commission – A new impetus for consumer protection policy, COM(85) 314 final, p. 2 et. seq.

¹²⁹Now art. 114 TFEU (previously art. 95 TEC).

¹³⁰Lecheler, in Dausen, EU-Wirtschaftsrecht, H.V. para. 15; Tonner, in JZ 1996, p. 533 at p. 537.

¹³¹Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJEC L 250, 19/9/1984, p. 17 et seq.

Directive 85/577/EEC¹³² and the Product Liability Directive 85/374/EEC¹³³, the objective of protecting consumers in their fundamental rights under the action programme of 1975 could be realized ultimately.¹³⁴ It is here, among other things, the Unfair Contract Terms Directive 93/13/EEC¹³⁵ and the Distance Selling Directive 97/7/EC¹³⁶ as an example Directive 2009/72/EC expressly referenced¹³⁷, as well as the Comparative Advertising Directive 97/55/EC¹³⁸, the Injunctions Directive 98/27/EC¹³⁹ and the Consumer Sales Directive 99/44/EC.¹⁴⁰

The Consumer protection, which was thought to be concomitant of other policies, was upgraded and was to some extent already an autonomous part of the Community policies; the Community was obliged in view of the different standards in the Member States to the integration through consumer protection.¹⁴¹

¹³²Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJEC L 372, 31/12/1985, p. 31 et seq., which will be repealed with effect from 13 June 2014 and replaced by Directive 2011/83/EU of the European Union and the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJEC L 304, 22/11/2011, p. 64 et seq. (Consumer Rights Directive).

¹³³Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJEEC L 210, 7/8/1985, p. 29 et seq.

¹³⁴Micklitz, in VuR 2003, p. 2 et seq.

¹³⁵Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEEC L 095, 21/4/1993, p. 29 et seq.

¹³⁶Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJEC L 144, 4/6/1997, p. 19 et seq., which will be repealed with effect from 13 June 2014 and replaced by Directive 2011/83/EU of the European Union and the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJEC L 304, 22/11/2011, p. 64 et seq. (Consumer Rights Directive).

¹³⁷Directive 2009/72/EC, Annex I para. 1 at the beginning.

¹³⁸Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJEC L 290, 23/10/1997, p. 18 et seq.

¹³⁹Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJEC L 166, 11/6/1998, p. 51 et seq.

¹⁴⁰Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJEC L 171, 7/7/1999, p. 12 et seq.

¹⁴¹Rösler, in EuR 2008, p. 800 at p. 803 et seq.

3.1.1.4 Independent competence – Treaties of Maastricht and Amsterdam

With the Maastricht Treaty of 7 February 1992, entered into force on 1 November 1993, consumer protection was as an independent competence of the Community incorporated in art. 129 a in conjunction with art. 3 lit. s) TEC.¹⁴² The introduction of this legal basis, which was regarded as an authorization of the completion of the internal market independent consumer policy, represented a further step towards the strengthening of consumer protection.¹⁴³ The justification of this clause arises already in the context that consumer interests are also more or less affected in almost all other policy areas.

The development of consumer protection law has been updated further with the Amsterdam Treaty of 2 October 1997¹⁴⁴, entered into force since 1 May 1999, and was updated with the transfer of art. 129 a TEC in art. 153 TEC; in this provision, which expanded the powers of the Community in particular in relation to the taking of action by the Community in respect of the Member States, a cross-sectional clause was implemented in favour of consumer protection (art. 153 para. 2 TEC). This from the European Council in Amsterdam in June 1997 passed "Action Plan for the Single Market"¹⁴⁵ provided a temporal link between the development of the internal market with the entry into the final stage of European Economic and Monetary Union by 1 January 1999 and pointed out therefore four new main objectives, namely to simplify and improve the application of rules at Community and national level, the elimination of distortions of competition, the reduction of sector-specific barriers and the strengthening of the consumer.¹⁴⁶

142Reich/Micklitz, *Europäisches Verbraucherrecht*, § 1 p. 18.

143Berg, in Schwarze, *EU-Kommentar*, art. 153 EGV para. 3; Micklitz/Reich, in *EuZW* 1992, p. 593 at p. 597.

144Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJEC C 340, 10/11/1997, p. 1 et seq.

145Commission Communication of 4 June 1997 to the European Council – Action plan for the single market, CSE(97) 1 final – not published in the Official Journal.

146Kahl, in Calliess/Ruffert, *EUV/AEUV*, art. 26 para. 36; Seventeenth annual report on monitoring the application of Community law (1999), COM(2000) 0092 final, section 2.1, where a positive balance was drawn concerning the implementation of the objectives.

3.1.2 Treaty of Lisbon, art. 169, art. 12 TFEU

The Treaty of Lisbon, adopted on 13 December 2007, took over the existing art. 153 TEC in art. 169 TFEU almost unchanged with the exception of the previous in art. 153 para. 2 TEC enshrined so-called cross-sectional clause, which was updated under the generally applicable provisions as art. 12 TFEU. Therefore, the requirements of consumer protection should be taken into account also in the definition and implementation of other Union policies and activities without enjoying priority in terms of a primary compliance duty.¹⁴⁷ Hence, the consumer protection objectives must be included in the considerations, which are to be made to concrete actions in other policy areas.¹⁴⁸ The Union is primarily norm addressee of the horizontal clause; against the background that art. 12 TFEU comprises the definition and implementation of other Union policies and measures the Member States may be nevertheless also norm addressees, if and insofar as they implement consumer protection policies of the Union.¹⁴⁹

According to art. 38 CFR the Union has to ensure a high level of consumer protection. In deviation from the cross-section clause under art. 12 TFEU therefore the Union has not only to take into account consumer protection, but is required in this regard.¹⁵⁰ Art. 38 CFR is not a standard competence and does not set up any improvement in the level of consumer protection obligations to act.¹⁵¹ However, the provision is taken into account in the interpretation of the relevant secondary legislation.¹⁵²

¹⁴⁷Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 12 para. 1.

¹⁴⁸Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 169 para. 9; Grub, in Lenz/Borchardt, EUV/EGV, art. 153 para. 38.

¹⁴⁹Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 12 para. 7; Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 14.

¹⁵⁰Voet van Vormizeele, in Schwarze, EU-Kommentar, art. 38 CFR para. 3.

¹⁵¹Voet van Vormizeele, in Schwarze, EU-Kommentar, art. 38 CFR para 4; Heselhaus, in Heselhaus/Nowak, § 62 para. 28.

¹⁵²Jarass, Grundrechte, § 34 para. 14.

3.2 "Status-quo" of consumer law – EU action

3.2.1 Incoherent consumer policy of the Union - new targets

So far, consumer protection has not been developed neither in terms of a conceptual community policy nor systematically; consumer protection policy was not creatively but in the sense of a policy based on mere reaction, e.g. to prevent already existing dubious business practices.¹⁵³ Deficits were especially identified in business relations between companies and customers as consumers, the so-called "B2C", so that the internal market for consumers neither realized its potential nor keeps pace with the ongoing development of the internal market on B2C-transactions; existing EU consumer protection Directives offer no comprehensive framework for business practices in the B2C-sector as a central aim regarding consumer protection.¹⁵⁴

The lack of a dogmatic European legal concept of consumer protection private law is reflected also, that there is no consumer protection legal framework Directive with basic terms and concepts; each Directive applies mostly own rules for its own substantive scope also to basic questions without sufficient coordination and thus coherence to parallel acts.¹⁵⁵ After this in art. 7 TFEU codified "coherence principle" as a principle of legal design the legal standards under the EU legislation are to merge in accordance with the commandment of unity of European law into a meaningful and consistent whole complex, so to avoid a possible regulatory contradiction; a violation of this principle, that has no legal but merely a legal policy binding effect, however, does not lead to the illegality of the affected regulation.¹⁵⁶

With the goal of creating a consistency the Commission developed other activities in the field of consumer protection as a young independent competence area by giving an overview of the field and informed all the parties, who were affected by this field from different angles including already achieved targets, still existing problems and possible measures in the future. On 2 October 2001 the "Green Paper on consumer protection in the European Union", with which a wide-ranging public consultation on the future direction of consumer protection in the EU should be set in motion, was

¹⁵³Reinhard, in the European Legal Forum (D), Heft 2, p. 86 at p. 88.

¹⁵⁴Green Paper on European Consumer Protection, COM(2001) 531 final, p. 1 et seq.

¹⁵⁵Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 17.

¹⁵⁶Härtel, Handbuch der Europäischen Rechtssetzung, p. 23 et seq.

presented.¹⁵⁷ After that generally formulated objectives of consumer policy namely the creation of a control system, which in addition to the issue of efficient and effective law enforcement also provides in particular a high level of consumer protection at the lowest possible cost to the economy, were defined.¹⁵⁸

Establishing the transparency and predictability of Commission action concerning the consumer protection area the Commission published various messages such as "Follow-up communication to the Green Paper on consumer protection in the EU"¹⁵⁹, the "Consumer Policy Strategy 2002-2006"¹⁶⁰ and the "EU Consumer Policy Strategy (2007-2013)"¹⁶¹, where the consumer protection law targets with a higher level of detail, have been updated. This concerns in particular:

- “To empower EU consumers. Putting consumers in the driving seat benefits citizens but also boosts competition significantly. Empowered consumers need real choices, accurate information, market transparency and the confidence, that comes from effective protection and solid rights.
- To enhance EU consumers welfare in terms of price, choice, quality, diversity, affordability and safety. Consumer welfare is at the heart of well-functioning markets.
- To protect consumers effectively from the serious risks and threats, that they cannot tackle as individuals. A high level of protection against these threats is essential to consumer confidence”.¹⁶²

The achievement of these targets, which are closely linked to the creation of a fully completed internal market - also related to the electricity sector - is analysed in detail on the basis of various

157Green Paper on European Consumer Protection, COM(2001) 531 final, p. 1 et seq.

158Green Paper on European Consumer Protection, COM(2001) 531 final, p. 4.

159Communication from the Commission - Follow-up communication to the Green Paper on EU Consumer Protection, COM(2002) 289 final, p. 1 et seq.

160Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2002 - 2006, COM(2002) 208 final, p. 1 et seq.

161Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee - EU Consumer Policy strategy 2007 – 2013, COM(2007) 99 final, p. 1 et seq.

162Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee - EU Consumer Policy strategy 2007 - 2013, COM(2007) 99 final, p. 5 et seq.

consumer protection provisions of the Directive 2009/72/EC in the following part 3 of the work.

3.2.2 National implementation of consumer law - legal fragmentation

Against the background of the previously carried out incoherent EU consumer policy, the question of the consequences at Member State level in general and in particular in relation to the internal market in electricity arises.

3.2.2.1 Member State implementation methods

While Member States such as the Netherlands and Germany follow a so-called integrated approach other Member States implement consumer law in a specially designated codified law separate from other legal matters; this relates to Member States such as Austria ("Konsumentenschutzgesetz") or Romanic countries such as France ("Code de la consommation"). Consumer law in Member States such as the UK and Ireland, however, follows the typical Anglo American law called case law and partly also depends on individual statutory national regulations. Therefore, there are especially for historical reasons different approaches of Member States in the implementation of European consumer protection regulations with the intention of a European legally compliant implementation. In addition, in many Member States consumer protection rules were codified prior to the adoption of Community provisions, so that different starting conditions existed at Member State level.

These different approaches to the implementation of the European guidelines into national law and the different initial conditions with respect to existing Member State rules led to different standards of protection including a different level of consumer protection in each Member State. This is evident, for example, by the Distance Selling Directive 97/7/EC in relation to various configured information requirements of entrepreneurs in favour of consumers and withdrawal periods within the Member States – revocation is to declare partially within 7, 8, 10 and sometimes 14 or even 15 days.

These from the sphere of the Member State originated factors are added beyond external factors as the rapid pace of technological progress, which cause an ever-increasing number of consumer protection rules and thus a difficult manageable high density of regulations. In particular, the

increasing globalization with a accompanying technical networking accelerates the completion of so-called "online transactions". This fact already required a number of regulations to protect consumers and will require additional regulations in the future. The diversity of already existing regulations within the European Member States is additionally accelerated hereby.

3.2.2.2 Fragmentation of consumer protection law

The result is in addition to the already existing trend the risk with regard to a further fragmentation of the Member State consumer protection law at European level, which behaves contrary to a functioning competition, for example, on grounds of disability of cross-border transactions also in the electricity sector concerning the electricity supplies and thus in relation to the European objective of the completion of the internal market due to differences in transaction costs of energy traders.

Legal fragmentation is attributed on the one hand to the principle of the mainly applied minimum harmonization as explained under 3.2.3.2, i.e. the establishment of minimum standards in the European consumer protection Directives and therefore the granted possibility in favour of the Member States to adopt in the implementation of the Directive into national law stricter rules laid down in the respective Directive or maintain the existing regulations, which many Member States have made use of, and is attributed on the other hand to the non-uniform as well as non-implementation of rules into national law.¹⁶³

Against this background taking into account the above-mentioned differences at Member State level and the high dynamics of consumer law, which is to extrapolate constantly, European Union and Member States are facing together the challenge to reach a solution with the objective of achieving a greater coherence in consumer protection law.

¹⁶³Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, p. 6; Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, p. 4.

3.2.2.3 Fragmentation of consumer protection law in the internal electricity market

A fragmented consumer protection law at the level of Member States exists also in relation to Directive 2009/72/EC in the internal electricity market as different notes in the recitals of Directive 2009/72/EC as well as Communications from the Commission confirm.

Thus, to create a level playing field at retail level the activities of distribution system operators should be monitored therefore so that they are prevented from taking advantage of their vertical integration regarding their already existing competitive position on the market in particular in relation to household and small non-household customers and thus to the detriment of those consumers.¹⁶⁴ The essential aim is to commit “securing common rules for a true internal market” in electricity.¹⁶⁵

Further, an existing price regulation in many Member States leads to a prohibitive effect at the expense of other market participants, which could occur to other established businesses in competition; hereupon, the low exchange rate may be attributed to in some Member States.¹⁶⁶ In addition, a more passive behaviour of small and medium-sized enterprises (“SME”¹⁶⁷) and households compared to large industrial customers is identified in relation to their role as market actors, which is caused in part to inefficient consumer protection, lack of transparency or user-friendly information; this prevents a diversification of services and the development of value-added services.¹⁶⁸

The substantive connection between a consistent consumer protection law at national level and

¹⁶⁴Directive 2009/72/EC – recital (26).

¹⁶⁵Directive 2009/72/EC – recital (60).

¹⁶⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 10 and comments in footnote 38 in this Communication.

¹⁶⁷Definition of “SME” in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises 2003/361/EC, OJEC L 124, 20/5/2003, p. 36 et seq.; art. 3 para. 3 s. 1 Directive 2009/72/EC adopts the definition „Small Enterprise“ of the category of SME in the meaning of Annex art. 2 para. 2 Annex Title I Commission Recommendation 2003/361/EC.

¹⁶⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 10 and comments in footnotes 35 and 36 in this Communication.

effective competition as a prerequisite to move consumers to take an active role as a market participant is already clear from these examples.

Accordingly, the Commission stated to carry out primarily infringement proceedings against those Member States, that have not yet implemented the Directives of the “Third Internal Energy Market Package” completely or incorrectly, wherein the Commission expressly refers to the review of the implementation of Directive requirements into national law in relation to their conformity to European Law - since September 2011 nineteen infringement procedures were opened for non-implementation of Directive 2009/72/EC by the Commission.¹⁶⁹

3.2.3 Approximation of the consumer protection law - harmonization

The need for approximation of laws arises from the consideration that the internal market is complete if there is only one law in the territory of the EU; in any case would be limits in trade no longer present.¹⁷⁰ However, the principle of equal treatment in the internal market requires differentiations, where in reality differences exist or where the target concerning a space without boundaries is attainable without uniform regulations; therefore, market equality in the internal market may be accomplished also by differentiating regulations through the approximation of legislation.¹⁷¹

The EU options available to the alignment of Member State legislation to achieve the objective of creating a more coherent consumer protection law also in relation to the internal electricity market are presented below.

¹⁶⁹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 10 and comments in footnote 31 in this Communication.

¹⁷⁰Borchardt, Die rechtlichen Grundlagen der Europäischen Union, p. 354 para. 798.

¹⁷¹Borchardt, Die rechtlichen Grundlagen der Europäischen Union, p. 354 para. 799.

3.2.3.1 Approximation of laws - legal standardization

First of all, the clarification of the term "alignment" and its contrast to the "unification of law" is necessary.

Both terms are not defined in the Treaties. The term "alignment" is the factual approach of national legislation to a predetermined EU law standard to understand, whose main application is to eliminate the national legal differences and the distortions of competition thereby caused.¹⁷² By the "alignment in nature less than complete unification"¹⁷³ the autonomy of Member State legislation should not be affected; for not equality but equivalence is the essential characteristic of the aligned provisions.¹⁷⁴ In addition to the notion of "approximation of laws" (art. 114 para.1, art. 151 TFEU) other terms like "harmonization" (art. 113, art. 114 para. 4 and para. 5, art. 166 para. 4 TFEU) and "coordination" (art. 50 para. 2 lit. g), art. 52 para. 2, art. 53 para. 2 TFEU), which are to understand synonymous to the term "alignment", are used.¹⁷⁵ All of these terms follow the same purpose namely to overcome restrictions, that are based on different national legal systems, and thus to promote a sustainable economic development.

Thus, the alignment serves the pursuit of the objectives of the Union with the aim to enable a better exercise of the fundamental freedoms of the internal market to fix malfunctions of the market and to avoid distortion of competition by eliminating legislative disparities.¹⁷⁶ The alignment must be understood functional as means to an end integration.¹⁷⁷ In the opinion of the ECJ the purpose is directed "to mitigate resulting obstacles of all kinds" caused by the diversity of national regulations.¹⁷⁸

¹⁷²Taschner, in von der Groeben/Schwarze, Kommentar zum EU-/EG-Vertrag, art. 94 EGV para. 4; Geiger, in Geiger/Khan/Kotzur, EUV/AEUV, art. 114 para. 2; Fischer, in Lenz/Borchardt, EUV/EGV, Vorbemerkung art. 114 - 118 para. 1; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 13.

¹⁷³Leible, in Streinz/Ohler, EUV/EGV, art. 94 para. 17.

¹⁷⁴Behrens, Die Gesellschaft mit beschränkter Haftung im internationalen und europäischen Recht, p. 64 para. 2.

¹⁷⁵Leible, in Streinz/Ohler, EUV/EGV, art. 94 para. 18; Bock, Rechtsangleichung und Regulierung im Binnenmarkt, p. 53 et seq.; Borchardt, Die rechtlichen Grundlagen der Europäischen Union, p. 357 para. 806.

¹⁷⁶Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 518 para. 1; Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 5.

¹⁷⁷Fischer, in Lenz/Borchardt, EUV/EGV, Vorbemerkung art. 114 - 118 para. 2; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 14.

¹⁷⁸ECJ C-193/80, Commission v. Italy (9/12/1981), E.C.R. I-3019, para. 17.

3.2.3.2 Minimum harmonization - full harmonization

As a means to approximation of laws are both minimum and full harmonizing regulatory instruments considered.¹⁷⁹ With the full harmonization in its place sometimes the term "total harmonization" is used interchangeably uniform rules of substantive law should be achieved at Member State level. In contrast, in the case of minimum harmonization only minimum standards, which must be implemented by Member States retaining the right in the sense of "competition to the jurisdictions" to adopt or maintain more stringent regulations than provided for in the relevant Directive, are defined.¹⁸⁰

Against the background that the Directive 2009/72/EC, inter alia, is based on the internal market competence of art. 95 TEC (now art. 114 TFEU) a full harmonization of consumer protection regulations contained therein would be basically feasible, for art. 169 para. 2 lit. b) TFEU, as presented in this part under 3.5.1.1.4 below, does not come into consideration as a competence title. For the in art. 169 para. 4 TFEU enshrined competence of the Member States to maintain or introduce more stringent consumer protection measures refers according art. 169 para. 3 TFEU expressly only to Community law measures, that are adopted pursuant to art. 169 para. 2 lit. b) TFEU, thus representing measures in support of consumer policy for the Member States.¹⁸¹ Therefore, the way of full harmonization at an approximation on the basis of art. 114 TFEU would generally not be blocked.

Hence, the Commission considers in terms of achieving a harmonization of consumer protection legislation at Member State level in deviation from the approach of the so-called minimum harmonization that the concept of the so-called full harmonization would eliminate the present fragmentation of the law; the Member States may then apply no stricter provisions than those laid down at Community level.¹⁸² This would have the consequence that any regulatory powers would be

¹⁷⁹Streinz, in Streinz/Ohler, EUV/EGV, art. 3 para. 27.

¹⁸⁰Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 15; Leible, in Streinz/Ohler, EUV/EGV, art. 95 para. 42 et seq.

¹⁸¹Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 41; Paschke/Husmann, in GPR 2010, p. 262 at p. 263; Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 169 para. 7.

¹⁸²Green Paper on the review of the Consumer Acquis, COM(2006) 744 final; see also Directive 2011/83/EU of the European Union and the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJEC L 304, 22/11/2011, p. 64 et seq. (Consumer Rights Directive), where it is, among other things, referred on recital (7), which is codified in art. 4 as a

removed from the Member States. But just focusing on the principle of full harmonization of consumer private law by the Member State legislature would not guarantee, however, a higher degree of alignment.¹⁸³

According to the opposite conception this approach of full harmonization would dismiss the Member States of their responsibility in relation to a competition for the best solutions to protect consumers and would therefore lead to a reduction of the already in some Member States achieved level of protection thus undermining the overall achievement of the objective of a high level of protection at EU level; therefore, it is argued that the consumer protection law minimum standard should come straight from the developments taking into account the creativity of the more advanced Member States in the sense of a contract binding “best practice” for the other Member States.¹⁸⁴ This will be addressed later in this part 3.5.1 in the presentation of the consumer protection law competences of the Union and the associated remarks on the so-called “protection strengthening clause” under art.169 para. 4 s. 1 TFEU.

Another possible third option could be in terms of a compromise between the above mentioned two principles due to their potential disadvantages, namely the risk of further fragmentation of the law on the one hand and a protection level reduction on the other hand, to offer the concept of a mixed harmonization in the context of alignment in the energy-specific consumer protection law.¹⁸⁵ This concept, which would not attach to the complete policy but rather on individual policy areas,

principle concerning the elimination of obstacles resulting from the legal fragmentation.

¹⁸³Artz, in GPR 2009, p. 171 at p. 177.

¹⁸⁴Tonner, Für einen starken Verbraucherschutz in Europa und den Mitgliedstaaten, p. 1 at p. 3; Schulze, in Schulte-Nölke/Tichý, Perspectives for European Consumer Law, p. 18 et seq. - in this regard is presented based on the Directive 2011/83/EU of the European Union and the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJEC L 304, 22/11/2011, p. 64 et seq. (Consumer Rights Directive) that “The level of the current minimum harmonization cannot be the level of a future full harmonization; the result would otherwise be - contrary to 153 TEC (now art. 169 TFEU) – a race to the bottom for consumer protection in the European Union. It would be an incorrect approach to neglect the experiences and current status of consumer protection in the Member States, and to merely adopt the minimum solutions from current Community law as full harmonization“; see also Stuyck, in Schulte-Nölke/Tichý, Perspectives of European Consumer Law, p. 42 – in this regard it is illustrated under the general conclusion: “The full harmonization character on the rules may lead to a reduction of the level of consumer protection in those Member States, which have introduced a better protection for consumers in view of the minimum harmonization character of the Consumer Sales Directive.“

¹⁸⁵Paschke/Husmann, in GPR 2010, p. 262 at p. 265 – the concept of mixed harmonization in consumer protection private law as a possibility is explained in detail by referring to different examples of regulatory areas, for which full harmonization could be an option and where the principle of minimum harmonization should be to maintain.

therefore would have taken into account, which regulatory areas would necessarily be given for full harmonization, and for which provisions a minimum harmonization with the possibility of retaining Member States' protection strengthening would be purposive; in other words, it should be the aim to identify the right balance between the two approaches of harmonization, namely a full and minimum harmonization. Thus, for example, the different withdrawal periods explained under 3.2.2.1 are suitable for a full harmonization; the regulations have developed within the Member States usually on the basis of Union law, where they have similar features and are relatively independent of doctrines in terms of the general contract law of Member States.¹⁸⁶ So it is in every case to provide a full rules-related differentiated approach as a full harmonization like in the above example concerning the withdrawal period is not suitable for all consumer protection regulations.

Related to the consumer protection law of Directive 2009/72/EC a scope assigned to the full harmonization in the above sense should represent certain definitions such as that of the consumer. However, for example, the previously selected approach of minimum harmonization to ensure universal service related to a specific customer group with the option opened to the Member States to extend the fundamental supply duty as a supply obligation at reasonable, easily and clearly comparable and transparent as well as non-discriminatory prices according art. 3 para. 3 s. 1 Directive 2009/72/EC on more customer groups should be retained as an energy-specific scope. This will be discussed in the following part 3 under 4.1.2.

In each case at a full harmonization measure is to examine on the basis of respecting the principle of subsidiarity under art. 5 TEU, to which the principle of full harmonization is in tension, whether Member States are not capable of realizing the consumer protection law objectives of the Directive.¹⁸⁷ Furthermore, it is imperative to ensure that a unification of law may not result a "race to the bottom" in the sense of levelling to the respective lowest EU level of a Member State.¹⁸⁸

The minimum harmonization principle may not be combined with a so-called internal market clause, which refers to the country of origin principle as proposed by the EU as a possible option; the Commission has already stated itself that this approach may not lead to an elimination of the

¹⁸⁶Schulze, in Schulte-Nölke/Tichý, Perspectives for European Consumer Law, p. 18.

¹⁸⁷Nettesheim, in Oppermann/Classen/Nettesheim, Europarecht, p. 171 para. 29; Paschke/Husmann, in GPR 2010, p. 262 at p. 263.

¹⁸⁸Seidelberger, in ÖBl. 2002/57, p. 260.

fragmentation of the law so it would not be beneficial for consumer confidence.¹⁸⁹ For this would result that providers so basically entrepreneurs are likely to contract agreements under the laws of their home country. Consumers would therefore be faced with the legal systems of all EU Member States and would have to check the normative content of the law applicable to the respective offer. This would run counter to the EU notion of competition and would behave contrary to the objective of a high level of consumer protection. The protection of the so-called passive consumers by private international law, namely art. 5 of the Rome Convention¹⁹⁰, is granted by that fact that this protection of the mandatory consumer protection provisions of the country, in which the consumer has his habitual residence, cannot be withdrawn otherwise the aforesaid principle of country of origin would be eliminated.¹⁹¹

3.2.3.3 Directive as an instrument of approximation of laws

As an essential instrument of harmonization of Member State legislation and thus as a stepping-stone to achieve the objective of alignment the secondary legislation act of the Directive within the meaning of art. 288 TFEU is available. However, the Regulation as a measure of alignment also comes into consideration as the three Regulations of the "Third Internal Energy Market Package"¹⁹² based on art. 95 TEC (now art. 114 TFEU) demonstrate. The legal act of a Regulation may in some areas exceptionally also fulfill the function of alignment in addition such as in the context of measures establishing the free movement for workers pursuant art. 46 TFEU, the competence complement clause as a flexibility clause under art. 352 TFEU as well as in above mentioned art. 114 TFEU.¹⁹³

Art. 288 TFEU itself does not constitute authority for the adoption of Directives; the institutions of the EU have no general competence to lawmaking but require by the principle of conferral a

¹⁸⁹Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, p. 12 et seq.

¹⁹⁰Rome Convention on the law applicable to contractual obligations, OJEU C 027, 26/01/1998, p. 34 et seq.

¹⁹¹Rott, Grünbuch „Die Überprüfung des gemeinschaftlichen Besitzstandes im Verbraucherschutz“ - Eine kritische Analyse der aufgeworfenen und nicht aufgeworfenen Optionen, p. 11.

¹⁹²See the Regulations listed under footnote 2.

¹⁹³Biervert, in Schwarze, EU-Kommentar, art. 249 EGV para. 17.

separate legal basis, which defines both the legislative powers and the selected act.¹⁹⁴ In the absence of appropriate specification the standard-setting bodies have according art. 296 para. 1 TFEU freedom of choice; in this respect is to be noted the principle of proportionality and according to the "Protocol on the application of the principles of subsidiarity and proportionality"¹⁹⁵ in addition the principle of subsidiarity.

Unlike the Regulation, which is pursuant art. 288 para. 2 TFEU directly applicable in all Member States and is general applied and binding, thus usually aims as "European law" with the exception of the aforementioned areas the unification of law¹⁹⁶, the Directive includes under art. 288 para. 3 TFEU in its objective two stages. It is pursuant art. 288 TFEU as to the objective to be achieved binding on the Member States. What is meant here are not objectives of the Treaty but the legal effects, which can be derived from the content of the Directives and which the Member State has to guarantee in its territory.¹⁹⁷ The Member States are therefore obliged to take all necessary measures to ensure the full effectiveness of the Directive in accordance with its objectives.¹⁹⁸ The two-stage legislative process, which is caused by the Directive, restricts the competence of Member States to an autonomous regulation but leaves them to some extent the choice of form and means for the implementation of the Directive.¹⁹⁹ However, the Community Directive requirements may be so detailed that the discretion of the Member States in the implementation of the Directive into national law is practically excluded so as a matter of fact a full implementation in relation to the requirements of Community law without their own discretion is mandatory.

The Directive thus intended the approximation of law by taking into account the Member State characteristics on the one hand. On the other hand the intention of the EU for a uniform law has to be expressed. The Directive represents a compromise between the Union and the Member States as

194Biervert, in Schwarze, EU-Kommentar, art. 249 EGV para. 11.

195Art. 5 s. 1 et seq. Protocol on the application of the principle of subsidiarity and proportionality, OJEU C 306, 17/12/2007, p. 150 et seq.

196Biervert, in Schwarze, EU-Kommentar, art. 249 EGV para. 17.

197Biervert, in Schwarze, EU-Kommentar, art. 249 EGV para. 24; Ipsen, Richtlinien-Ergebnisse, in Hallstein, FS Ophüls, p. 73 et seq. - then it would be better in line with the text of other languages of the Treaty to speak of the "result" (résultat, result, risultato, resultaat) instead of the "target".

198ECJ C-14/83, von Colson and Kamann v. NRW (10/4/1984), E.C.R. 1891, para. 15; Biervert, in Schwarze, EU-Kommentar, art. 249 EGV para. 26.

199Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 529 para. 43.

a flexible instrument of legal approximation. The aligned law remains European-influenced national law on the one hand and is still subject to the interpretation by the national courts on the other hand.²⁰⁰ Ultimately, scope and scale of legal harmonization intended by the Directive in the sense of an approximation of the national legislation depend on the proper implementation of the Directive guidelines by the Member States in accordance with their generally existing implementation scope.

In this sense it is regulated in the Directive 2009/72/EC that the fulfillment of public service requirements is a fundamental requirement, and it is important that common minimum standards respected by all Member States are specified in this Directive taking into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States; it is important that the public service requirements can be interpreted on a national basis taking into account national circumstances, wherein the Community law is to meet.²⁰¹

3.2.3.4 Requirement of legal harmonization in the internal electricity market

Also the consumer protection law codified in the electricity Directives has not been implemented in part and partly implemented only in different ways into national law as the reference in this part under 3.2.2.3 concerning in terms of Directive 2009/72/EC conducted infringement proceedings confirmed. This also applied to the predecessor Directive 2003/54/EC, which was noted by several studies²⁰² and is clear from the recitals to the successor Directive 2009/72/EC; thereafter, for example, a “non-discriminatory network access and an equally effective level of regulatory supervision do not yet exist in each Member State.”²⁰³ The two latter factors directly affect the consumer protection. Furthermore, only in some Member States a so-called "social tariff for electricity" for low-income consumers exists while other Member States have not adopted such a special tariff yet; the Directive calls for measures concerning "vulnerable customers" under art. 3

200Lutter, in JZ 1992, p. 593; Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 529 para. 43.

201Directive 2009/72/EC – recital (46).

202Directive 2009/72/EC – recital (7), where reference is made, inter alia, to the Communication of the Commission of 10 January 2007 “An Energy Policy for Europe“ highlighted the importance of completing the internal market in electricity and creating a level playing field for all electricity undertakings established in the Community.

203Electricity Access Regulation No 714/2009 – recital (3).

para. 7, para. 8 Directive 2009/72/EC while leaving both definition and choice of the protection instrument to each Member State.²⁰⁴

Also in relation to the Directive 2009/72/EC there is a requirement with respect to Member State law approximation, which will be discussed in the scope of the investigation both in this part of the work and in the context of the presentation of the consumer protection provisions of Directive 2009/72/EC in the following part 3. At this point, it must be already clarified that the Directive basically sets up minimum requirements in relation to consumer protection regulations to be complied with by the Member States, so national reinforcement protection measures are permissible and possible. Thus, for example, the Member States have to ensure under art. 3 para. 3 Directive 2009/72/EC the so-called universal service for residential customers within the meaning of Art. 2 no 10 Directive 2009/72/EC, where they have the option to extend this universal service on small businesses. The European Union legislature applies basically the principle of the so-called minimum harmonization.

3.3 Interim conclusion

In the context of the completion of the European internal market the importance of consumer protection, which has been considered since the first half of the 1970s as an independent field of action at Community level²⁰⁵, is reflected in its forty-year history. The persistently high dynamics of industrialization and the associated technological progress also have implications for consumer protection like the now existing density of regulations of consumer protection standards in a variety of different consumer protection-specific provisions but also cross-sectoral Directives, that contain also consumer protection provisions, such as the Directive 2009/72/EC shows.

A debate about the need and the usefulness of bringing together the numerous legal consumer protection EU Directives into a single EU Directive, which would have unified at least principles and thus would have eliminated any differences on fundamental issues, would be relevant to create a coherence first at European level and therefore necessary to achieve the objective of ensuring a high level of consumer protection and thus necessary for an effective competition in the European

²⁰⁴Gundel, in GewArch 2012, p. 137 at p. 140.

²⁰⁵Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 1.

internal market. At the level of the European Union legislature therefore a dogmatic uniform basic concept for the European legal consumer rights in the form of a smoothing of existing fundamental differences, which are codified in numerous Directives on consumer protection, is necessary. For a single dogmatic basic concept for the European consumer private law, that is, however, strictly considered separate from the harmonization as a separate subject, would be as such a noticeable progress.²⁰⁶

Due to many discordant provisions at Member State level a fragmentation of national consumer law in different areas, inter alia, also in relation to national electricity sectors can be observed. This applies equally to the European internal electricity market as the present investigation has found. As part of the required approximation of consumer law in the energy sector at national level the previously pursued principle of minimum harmonization should be in contrast to the approach of an exclusively full or minimum harmonization replaced by the principle of mixed harmonization as a compromise so that priority should be given to this.

The specific implementation of the harmonization and therefore its intensity should depend from an evaluation of the impact on Member State level on the basis of the existing consumer protection rules and their empirical values. Based on the Directive 2009/72/EC as an example the definition of consumer, which is shown under 3.4.1.2 subsequently, should be unified by following the principle of full harmonization, in which the approach of a broad notion of consumer is maintained. However, it should be followed the principle of minimum harmonization in such cases and with respect to those matters, where an adequate level of protection at EU level alone can not be achieved, so that the Member States themselves are obliged in this regard primarily.

²⁰⁶Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 17.

3.4 Consumer notion, consumer model within the meaning of Directive 2009/72/EC

Conceptually the notion of consumer as a central concept in consumer protection law and the consumer model have to be distinguished strictly from each other.

While the definition of consumer concerns the question of the personal scope of application of individual regulations, so who is to classify as a consumer, the question of the underlying consumer model is a normative-typifying, thus determines the interpretation and direction of consumer protection standards.²⁰⁷ The concept of consumer protection law covers the entirety of all standards, which are important for the legal status of consumers, regardless of whether they are linked to the notion of the consumer or not.²⁰⁸

3.4.1 European notion of consumer

3.4.1.1 Definition of the notion by EU law

The concept of the consumer is not yet uniform in the primary law and secondary law, but based on the respective subject area defined only partially. However, in the meantime on the legal acts of the Union can be concluded as a common denominator that consumer means any natural person, who is acting for purposes, which can be regarded as outside his trade or profession.²⁰⁹ This definition focuses primarily on the economic purpose of the action, i.e. in Directives concerning contract law on the legal transaction objective or the purpose of the contract. The legislation of Directives follows a typifying model²¹⁰; the characteristic of a consumer is basically determined objectively,

²⁰⁷Micklitz, in Säcker/Rixecker, MünchKomm, Vor §§ 13, 14 para. 6.

²⁰⁸Drexler, Die wirtschaftliche Selbstbestimmung des Verbrauchers, p. 85.

²⁰⁹Art. 2 lit. b) Directive 93/13/EEC; art. 2 no 2 Directive 97/7/EC; art. 1 para. 2 lit. a) Directive 99/22/EC; art. 2 slash 1 Directive 85/577/EEC; art. 3 lit. a) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJEC L 133, 22/5/2008, p. 66 et seq.; art. 2 lit. e) Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJEC L 178, 17/7/2000, p. 1 et seq.; art. 2 para. 1 lit. f) Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJEC L 33, 3/2/2009, p. 10 et seq.

²¹⁰Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 27; Schwartz, in ZEUP 2000, p. 544 at p. 551.

where it depends on the objective stated purpose at the time the contract is concluded²¹¹ and not on the ideas of the parties.²¹² The consumer facing an entrepreneur as a contractual partner in the consumer contract law as EU Directive law aiming to protect the self-determination of consumers in the economic sphere. Hence, such transactions, to which only consumers or entrepreneurs are involved, are simply not covered from the protective purpose of the consumer contractual guidelines.

3.4.1.2 Extensive notion of consumer according to Directive 2009/72/EC

In the Directive 2009/72/EC the notion of consumer is listed in numerous places both in recitals²¹³ and in the text of the Directive²¹⁴ without defining that term itself explicitly. Therefore, it requires a definition of the notion taking into account both the factual context, in which it is used, as well as the protective purpose of the individual regulations.²¹⁵

It is striking, that the legislature is using more terms in the context of consumer protection namely in particular the concept of "household customer", such as in art. 3 para. 3 s. 1 Directive 2009/72/EC, the notion of "customer" in the heading of Annex I and in para. 1 of Annex I Directive 2009/72/EC and the term of "end users", for example, in art. 3 para. 7 s. 1 Directive 2009/72/EC.

These terms are legally defined in the Directive itself. According to art. 2 no 7 Directive 2009/72/EC the term "customer" is defined as wholesaler or end user, who buys electricity. A "final customer" is according art. 2 no 9 Directive 2009/72/EC a customer buying electricity for his own use – these may include both natural persons and commercial customers, hence entrepreneurs. A further graduation was made with the definition of the term "household customer" under art. 2 no 10 Directive 2009/72/EC. This is a customer, who purchases electricity for its own consumption in the

²¹¹Faber, in ZEUP 1998, p. 854 at p. 866; Schwartz, in ZEUP 2000, p. 544 at p. 551; with doubts: Micklitz, in MünchKomm, § 13 para. 28.

²¹²Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 27; Schwartz, in ZEUP 2000, p. 544 at p. 551.

²¹³Directive 2009/72/EC – recitals (1), (3), (20), (50), (52), (54), (55), (57).

²¹⁴Art. 1 Directive 2009/72/EC, where reference is made to the definition of the rights of electricity consumers; art. 3 para. 2, para. 3, para. 12, para. 16 Directive 2009/72/EC, where in this para. 16 the term "energy consumer" is cited.

²¹⁵Dick, Das Verbraucherleitbild der Rechtsprechung, p. 12.

household; for reasons of clarity the purchase of electricity for commercial and professional activities was explicitly not included.

Therefore, the household customer is a consumer within the meaning of the aforementioned definition on the basis of legal acts of the EU. This definition of the notion corresponds to that of art. 2 lit. b) Unfair Terms in Consumer Contracts Directive²¹⁶ and art. 2 para. 2 Distance Selling Directive²¹⁷, to which Annex I para. 1 s. 1 Directive 2009/72/EC expressly refers; in accordance with that consumers are natural persons, who act for contracts or the conclusion of contracts falling under the guidelines for purposes, which can be attributed neither to their commercial nor their professional activity. However, it is not only the term "household customer" used in the context of the consumer protection rules of Directive 2009/72/EC; rather also aforementioned terms "customers" and "final customers" alike as vulnerable addressees are used equally.

Directive 2009/72/EC is therefore based on a broad consumer term. This approach is supported by several passages of Directive 2009/72/EC expressively. So already recital (1) refers to private and commercial consumers. According recital (42) small and medium enterprises as well as EU citizens should be able to enjoy a high level of consumer protection. In line with this regulation behaves art. 3 para. 3 s. 4 Directive 2009/72/EC, to which Member States are not hindered from strengthening the market position of the domestic, small and medium-sized consumers by promoting their possibilities of a voluntary association to represent the interests of this consumer group. According to art. 3 para. 7 Directive 2009/72/EC Member States shall take measures to protect final customers and ensure a high level of consumer protection as well as the existence of an adequate protection for vulnerable customers.

A broad interpretation and therefore use of the notion of consumer is preferable to a restrictive interpretation. This approach is justified teleological according to the actual "use" (art. 2 no 9 Directive 2009/72/EC) of energy - according art. 2 no 10 Directive 2009/72/EC "purchase of energy for own consumption". Thus the traditional understanding of Community law of a narrow notion of consumer is left. This understanding is further supported by the fact that consumers in the context of the underdeveloped competition in the internal energy market in general, so beyond the mere

²¹⁶See footnote 209.

²¹⁷See footnote 209.

household customers, are equally worthy of protection in order to achieve a self-determined activity of these consumers in the internal electricity market. The European Commission confirmed this approach also explicitly by its indication that consumers - including citizens and small businesses - must be able and need to have incentives to play an active role in the market in order to reap the full benefits of the internal market²¹⁸; in the context of further explanations SME are placed on a level with household customers.

For, the purposes of this broad definition a younger view in the literature considers the need particularly in the energy law sector for a further differentiation into different consumer types namely on the one hand the responsible consumer, which encloses the small and micro entrepreneurs, and on the other hand the vulnerable consumer; hence, the responsible consumer requires a legal model, which mainly ensures the access to the market in order to provide this consumer with the benefits of the internal market, while the vulnerable consumer is the addressee of social justice - because the vulnerability is due to the economic and social need for access.²¹⁹

3.4.2 European consumer model

The consumer model serves as a benchmark for assessment of the consumer expectation horizon²²⁰, and thus also as a yardstick to assess the ability with regard to the processing of certain informations. Therefore, the consumer model and the consumer term are not independent of each other but at a certain reciprocal relationship.²²¹ The consumer law concept inherent of Directive 2009/72/EC is based equally as any other concept on a specific guidelines-based concept on certain ideas about the protection object of the consumer accumulating to a so-called consumer model.²²² The orientation towards a particular consumer model has a significant impact on the means, by which and to what extent consumer protection is granted, if ever a need for protection is to assume

²¹⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 9.

²¹⁹Micklitz, in Beilage zu NJW 28/2012, p. 77 at p. 79.

²²⁰Micklitz, in Säcker/Rixecker, MünchKomm, Vor §§ 13, 14 para. 7.

²²¹Dreher, in JZ 1997, p. 167 at p. 175; Damm, in VersR 1999, p. 129 at p. 133; Heiderhoff, Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts, p. 257.

²²²Dreher, in JZ 1997, p. 167 at p. 170.

and to what extent competition or contractual law rules seem appropriate.²²³ Therefore the question is, which scale can be applied to the consumer, to achieve the standard of a consumer protection inherent protective purpose, so what a consumer can even contribute itself to achieve this and how he acts in this regard.

3.4.2.1 Role-related consumer protection

A method for the determination of the consumer model was seen in the recognition of a role-based consumer protection, which pursues a twofold objective, on the one hand namely to prevent, if possible, damages in connection with the private purchase or use of goods or services (protection of legal interests) and on the other hand to ensure the conditions of private autonomy and to take care that consumers may exercise their role responsibly and in economic terms reasonably (protection of the economic interests)²²⁴; this approach is based on the concept of the vulnerable and worthy of protection, so inferior, handicapped consumer as an individual compared to entrepreneurs with their generally superior market position.

3.4.2.2 Standard for consumer model according to ECJ

As part of the decision of the ECJ in 1998 on the case of "Gut Springenheide"²²⁵ the question of the possible deception of a consumer was not judged by empirical considerations, but purely normative, which corresponds to the model of an average well-informed, observant and mature consumer. This standard is required by the ECJ since the aforementioned decision to the European consumer model, also to be based in relation to the above-mentioned characteristics "observant" and "mature" average level similarly as in relation to the informed consumer²²⁶, who must be able based on sufficient transparent informations in a competitive internal market to make a reasonable decision for himself. This means on the other hand that such informations, which are understandable but inaccurate

²²³Köhler, in Baumbach/Hefermehl, Wettbewerbsrecht – Kommentar, § 1 UWG para. 18; Kocher, in VuR 2000, p. 831 et seq.

²²⁴Drexler, Die wirtschaftliche Selbstbestimmung des Verbrauchers, p. 284 et seq.; Reich, in ZEUP 1994, p. 381 at p. 387; Reich/Micklitz, Europäisches Verbraucherrecht, § 1 p. 22.

²²⁵ECJ C-210/96, Gut Springenheide (16/7/1998), E.C.R. I-4657, para. 31, 37.

²²⁶Sack, in WRP 1999, p. 399 et seq.; Spätgens, in WRP 2000, p. 1023 at p. 1027.

perceived or overlooked by the consumer, subsequently can not protect the consumer due to the objection of an existing deception; in this constellation the consumer, who would not meet just the average scale but acted recklessly, would carry this risk itself.

This approach, which is already represented in numerous Directives, that relate to consumer protection and which is to follow, consequently assumes the principle of a responsible consumer. Accordingly, measures of consumer protection in these Directives usually contain a clear information-stressed component, which in turn corresponds to the aforementioned consumer model of a responsible consumer.²²⁷ According to the ECJ rulings only those consumers are able to exercise their rights, who know them; in this context, the ECJ has emphasized expressively that consumers should be informed about their rights.²²⁸ The ECJ speaks of a fundamental right of the consumer to obtain adequate information.²²⁹

Consequence of this European consumer model is the priority of sufficient consumer information with respect to the mandatory rules and procedures as an instrument of consumer protection, which is derived from the principle of proportionality under art. 5 para. 3 TEU.²³⁰

3.4.2.3 Consumer model under Directive 2009/72/EC

The ECJ rulings were concretized by Directives in terms of the content of informations relevant to a consumer for his decision. According to a variety of Directives²³¹, in which the below listed information requirements - at least partly - are explicitly included, the consumer needs to be informed by the provider, i.e. the energy supplier and the network operator as under Directive 2009/72/EC especially about vendor identity, services rendered, offered maintenance services, tariffs, essential contract terms, including free withdrawal option from the contract and complaint

227Reich/Micklitz, *Europäisches Verbraucherrecht*, § 1 p. 45.

228ECJ C-386/00, *Axa Royal* (5/3/2002), E.C.R. I-2209, para. 20 et seq.

229ECJ C-362/88, *GB-INNO-BM* (7/3/1990), E.C.R. I-667, para. 18.

230Classen, in *Oppermann/Classen/Nettesheim*, *Europarecht*, p. 604 para. 6.

231Art. 4, 5 Distance Selling Directive 97/7/EC; art. 4 Doorstep Selling Directive 85/577/EEC; art. 3 Timeshare Directive 2008/122/EC.

mechanisms as well as procedure for dispute settlement proceedings.²³²

With these various informations consumers should also in the electricity sector put in a position and animated to take an active role in the completion of the internal energy market. For the Commission considers in the internal energy market SME and households evince a more passive behaviour as large industrial customers, which is why they suffer disadvantages in that price differences are not used; this is in turn partly due to inefficient consumer protection particularly due to lack of transparency or consumer-friendly information, which all engender low consumer satisfaction and trust.²³³

This consumer model is to maintain. For, the basis for the creation of a sustainable energy market is functioning competition so competitive deals with appropriate choices in favour for consumers. So, correspondingly the consumer model especially in the energy sector is that to the mature consumer, who actively serves the market as a participant due to the market-transparency and helps to shape the market. It is assumed here that by an effective market regulation impairments or otherwise existing imperfection of the electricity market are eliminated. The importance of an effective regulation for consumer protection, which moves within the area of tension between the regulating state, the network operator as a natural monopolist and the consumer on the basis of the broad notion of consumer is represented in the following part 3 under 4.4.

3.4.3 Interim conclusion

3.4.3.1 Conclusions regarding Directive 2009/72/EC

The classic general consumer term in the narrow sense is abandoned in favour of a broad approach in the energy sector. Hence, the term will be extended in Directive 2009/72/EC in particular to small and medium-sized enterprises so-called "SME" and captures even all other end users within the meaning of art. 2 no 9 Directive 2009/72/EC. The EU legislature intended to protect these companies - at least partially - as consumers like individuals.

²³²Art. 3 para. 7 s. 7 in conjunction with Annex I para. 1 Directive 2009/72/EC.

²³³See footnote 168.

The study shows that the European Union legislature establishes a close substantive connection between the achievement of a competitive electricity market and the need for a necessary extension of the concept of the consumer. The Union makes clear with this approach, that consumer protection and functioning of the internal market are mutually interdependent insofar, as such a market protects consumers on the one hand and is dependent on the active participation of consumers in its development and progression to its completion on the other hand. For only the protected consumer will serve the competition, which he controls and affected significantly through his consumption behaviour, and thus contribute to the internal market with the objective of its completion.

The consumer model goes away from the vulnerable to the responsible, prudently acting consumer, who is dependent both on adequate information within the meaning of a necessary market transparency from his point of view as well as a functioning regulatory equipped with supervisory and enforcement powers to prevent imminent or eliminating already occurred competition obstacles. Without the implementation of this state regulation order the consumer would be unprotected; the internal electricity market alone due to its imperfection would not be in a position to protect the mature and informed consumer also because of the non-existence of a functioning competition until now.

The consumer model approach in the Directive 2009/72/EC intended to further strengthen the consumer confidence in the internal electricity market. Sufficient and transparent informations have to ensure the protection of the average consumer as an empowered consumer. Not worthy of protection, however, is the inattentive, careless consumer, who does not serve the competition and therefore deserves no protection.

3.4.3.2 Conclusions for a subsequent Electricity Directive "de lege ferenda"

The wide notion of the consumer is to maintain. In a subsequent Directive the notion of consumer in the sense of art. 2 Directive 2009/72/EC is to define and thus to purport at EU level. A permissible differentiation according to specific groups of consumers, which is already addressed in approaches in Directive 2009/72/EC, must concretize the fundamental enabling and thus the guarantee of a uniform implementation of the corresponding requirements by the Member States through a clear assignment. Here, it is advisable depending on individual consumer relevant issues and the

respective attainment of their consumer legal protection purpose, a clear assignment of appropriate consumer groups such as household customers or SME as retail customers and all other end users to specific protection-related topics; experiences in the area of the still relatively young liberalized electricity market and in relation to the Directive 2009/72/EC securitized consumer-relevant legislation have to be evaluated regularly and to be taken into account in the updating of subsequent regulations accordingly.

"De lege lata" existing concepts and mapping inaccuracies based on individual circumstances are to eliminate "de lege ferenda" at Union level in a subsequent Directive in order to make out clear instructions to following regulations in the future to contribute to a higher level of harmonization in relation to the national consumer protection legislation. Because a different treatment of individual customer groups, which are qualified within the Member States partly as consumers and partially as non-consumers, leads to distortions due to unequal treatment in the competition between the Member States and therefore behaves contrary to the target of the envisaged completion of the internal electricity market.

3.5 Competences of the EU concerning consumer protection

Consumer protection law is subject to a growing dynamic at European level closely linked to the objective of achieving a high level of consumer protection in the context of the internal market, which is to be realized by the Union under art. 26 TFEU. Consumer protection and the internal market relate to each other in a factual context; they are mutually dependant to a certain extent. This applies equally to the consumer protection in the internal energy market.

What possible competences for the Union exist to achieve the objective of a high level of consumer protection in the internal electricity market and how possible competence titles in this connection relate to each other is explained below. In this context, the conditions of the central internal market competence of art. 114 TFEU as legislative competence are presented including barriers and limits in its exercise in general and in relation to the approximation of laws concerning the energy sector-specific consumer protection by the example of Directive 2009/72/EC.

3.5.1 Competences of the EU under art. 169 TFEU

Art. 169 TFEU represents the central consumer protection provision, which includes different approaches.

According to art. 4 para. 2 lit. f) TFEU the EU is contributing to the strengthening of consumer protection described in art. 169 TFEU in more detail pre-structured concerning the content through the objectives in art. 169 para. 1 TFEU and extended to promote the interests of consumers.²³⁴ Art. 169 para. 1 TFEU includes as the two overarching goals both promoting the interests of consumers and ensuring a high level of consumer protection. For the achievement of these overarching objectives the provision fixes a contribution, among others, to protect the economic interests of consumers as well as to promote their rights to information for the protection of their interests.

The economic interests of consumers comprise in particular their financial concerns as well as their legal and factual autonomy in shaping their relations with the demand side²³⁵; this broad definition, which does not merely intend the pure protection of legal rights but goes beyond it, affects also the economic freedom of disposition of the consumer as a market partner operating with other market participants at “eye level”. The most important guidelines concerning the protection of consumers economic interests include in particular the Distance Selling Directive 97/7/EC and the Unfair Terms in Consumer Contracts Directive 93/13/EEC, that are exemplary referenced by the Directive 2009/72/EC Annex I para. 1 s. 1 expressly. Furthermore, this includes the Consumer Sales Directive 1999/44/EC and the Doorstep Selling Directive 85/577/EEC as acts of civil law concerning consumer protection to safeguard important rights of the consumer against other market participants such as electricity suppliers or providers of energy services. Alike as in the energy sector-specific Directive 2009/72/EC enshrined consumer protection regulations these aforementioned exclusively consumer protection law guidelines are also relevant for the protection of consumers in the energy sector, so taken into account in the context of such consumer rights listed in the context of Annex I para. 1 Directive 2009/72/EC.

The right to information includes such activities aimed at improving the position of consumers as

²³⁴Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 2.

²³⁵Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 11.

demanders and users of goods and services regardless of the specific employment situation.²³⁶ To the rules on consumer information is pointed in various Directives such as in Directive on Comparative Advertising 97/55/EC as well as in the Directive 2009/72/EC²³⁷ itself in numerous places. These information rights constitute guidelines for the establishment and the interpretation of Community secondary legislation are too vague with regard to their claim scope, entitled content as well as in relation to the addressee as that solely enforceable subjective rights can be derived therefrom.²³⁸

Against the background of this limited competence of the Union, which only contributes to the strengthening of consumer protection under art. 169 para. 1 TFEU a distinction to the Member State responsibilities, which is not without controversy, is required. The need for clarification follows on the one hand according to the competency allocation of consumer protection as a shared competence by art. 4 para. 2 lit. f) in conjunction with art. 2 para. 2 TFEU, whereby the Member States exercise their competence to the extent the Union does not exercise its responsibility. On the other hand this follows directly from the wording of the primary law consumer protection provision. For, according to art. 169 para. 2 TFEU consumer policy occurs alongside relevant competences of Member States keeping the responsibilities of consumer policy; the Union should, however, only contribute to achieving the above objectives.²³⁹

3.5.1.1 Art. 169 para. 2 lit. b) TFEU

First, art. 169 para. 2 lit. b) TFEU is examined and delineated to art. 169 para. 2 lit. a) in conjunction with art. 114 TFEU with regard to its specific scope. Furthermore, the ratio of this provision is shown from the perspective of competence with respect to Directive 2009/72/EC.

²³⁶Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 9.

²³⁷Directive 2009/72/EC – recital (52), art. 3 para. 7 s. 5, para. 9 lit. b), lit. c), para. 9 s. 3, para. 12, para. 16 s. 1, art. 25 para. 3, Annex I para. 1 lit. a), lit. b), lit. c), lit. g), lit. i).

²³⁸Luriger, in Streinz/Ohler, EUV/EGV, art. 153 para. 20; Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 15; Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 9; other opinion: Reich/Micklitz, Europäisches Verbraucherrecht, § 1 p. 24 et seq.

²³⁹Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 169 para. 7.

3.5.1.1.1 Demarcation of art. 169 para. 2 lit. b) TFEU to art. 169 para. 2 lit. a) in conjunction with art. 114 TFEU

In contrast to art. 169 para. 2 lit. a) in conjunction with art. 114 TFEU as the so-called internal market competence the Union may adopt measures by art. 169 para. lit. b) TFEU, which support, supplement and monitor the policy pursued by the Member States; these are exclusively acts without internal market reference. Art. 114 TFEU as shown below in this part 2 under 3.5.2 in detail should be applied, if the measure e.g. through harmonization of Member States' consumer protection provisions is used to the completion of the internal market; art. 169 para. 2 lit. b) TFEU, however, is only and exclusively to apply as the appropriate measure, which primarily serves to raise the Member State consumer protection level without specific internal market reference.²⁴⁰ The internal market independent consumer policy is so far subordinate to national policies.²⁴¹

The procedure concerning measures by the policies of the Member States in the meaning of art. 169 para. 2 lit. b) TFEU is regulated in art. 169 para. 3 TFEU. These measures are legal acts within the meaning of art. 288 TFEU as well as so-called unmarked or atypical acts such as decisions, declarations and resolutions; this approach is already based by the reference in art. 169 para. 3 TFEU on the co-decision procedure in the meaning of art. 289 para. 1, 294 TFEU, which otherwise would not make any sense.²⁴²

3.5.1.1.2 Scope of art. 169 para. 2 lit. b) TFEU of competence perspective

This raises the question, whether art. 169 para. 2 lit. b) TFEU contains in addition an own competence rule for the approximation of laws or authorizes only aforementioned complementary measures. In any case, it would not be permitted to bind art. 169 para. 2 lit. b) TFEU to the existence of the internal market competence and therefore to demand the requirements of art. 169 para. 2 lit. a) TFEU also under art. 169 para. 2 lit. b) TFEU.²⁴³ With such an understanding art. 169 para. 2 lit. b) TFEU would repeat only art. 169 para. 2 lit. a) TFEU unnecessarily; thus, this approach is not in

²⁴⁰Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 12; Leible, in Streinz/Ohler, EUV/EGV, art. 95 para. 113.

²⁴¹Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 3.

²⁴²Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 18, art. 249 EGV para. 4.

²⁴³Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 35.

question.²⁴⁴ Furthermore, art. 169 para. 2 lit. a) TFEU - unlike art. 169 para. 2 lit. b) TFEU – refers to the promotion of consumer protection objectives set out in art. 169 para. 1 TFEU by such measures, which the Union adopts under art. 114 TFEU in compliance with the mandatory necessary requirements described below in this part 2 under 3.5.2 in detail.

A competence of the EU to more extensive, independent and mandatory consumer protection measures related to the internal market only incidentally would therefore be alien to the system; because this would be contrary to the restrained formulated cross-sectional clause according to art. 12 TFEU and the restrictive powers of the Community, after which a measure, that goes beyond the mere support, supplement and monitoring of the policy of the Member States, would create a overstepped competence of the Community towards the Member States and would thus violate the principle of subsidiarity.²⁴⁵ Thus the aforementioned measures of the EU logically presuppose existing measures of the Member States in the sense of a mere complementary competence.²⁴⁶

In regard to her competence the Union is therefore limited to support, supplement and monitor the policy pursued by the Member States; so the "primacy of the Member States" concerning consumer protection is illustrated and the principle of subsidiarity according to art. 5 para. 3 TEU is taken into account.²⁴⁷ Art. 169 para. 2 lit. b) TFEU does not justify final internal market measures of the EU but only those, which are subordinate to the policies of the Member States.²⁴⁸

The Union granted competences for pursuing an autonomous consumer protection policy are limited.

²⁴⁴Micklitz/Reich, in EuZW 1992, p. 593 at p. 597; Micklitz, in VuR 1991, p. 261 at p. 317, 319.

²⁴⁵Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 16; Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 35.

²⁴⁶ Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 35.

²⁴⁷Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 19; Paschke/Husmann, in GPR 2010, p. 262 at p. 263.

²⁴⁸Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 19 et seq.

3.5.1.1.3 Strengthening protection clause, art. 169 para. 4 s. 1 TFEU

Member States may as defined by the so-called strengthening protection clause in the meaning of art. 169 para. 4 s. 1 TFEU maintain or introduce more stringent consumer protection measures, which must be compatible with the Treaties under art. 169 para. 4 s. 2 TFEU e.g. with the provisions of the free movement of goods (art. 34 et seq. TFEU) and require a mere informative communication to the Commission in accordance with art. 169 para. 4 s. 3 TFEU; this power under art. 169 para. 4 TFEU relates exclusively to measures under art. 169 para. 2 lit. b) TFEU and does not refer primarily to those under art. 169 para. 2 a) TFEU.²⁴⁹

A higher level of protection through more stringent protective measures at Member State level remains possible in compliance with the aforementioned legal requirements.²⁵⁰ Art. 169 para. 2 lit. b) TFEU does not prohibit therefore a harmonization as a whole, however, reduces the subordination of Community consumer policy to a prohibition to unify the policies of the Member States completely; the EU must allow the EU Member States leeways so is only legitimate to the specification of minimum standards.²⁵¹ Consequently, there is a limit on the approximation of laws to mere minimum standards; however, it is permitted to the Member States to take or maintain beyond that protective measures.

This approach leads to a "fruitful interaction" between Member States themselves with respect to a respectively staggered adjustment possibility of the level of protection in the progressive consumer law with its large density of regulations, in which the Member States due to the aforementioned limited alignment possibility for the EU remain "Lord of the proceedings" in compliance with the contract conformity of the respective measure. Thus, such a correlation is possible by this in each Member State already implemented higher level of protection and a consequent permanent adjustment of the minimum standards by the Union²⁵²; this procedure with the result of an ongoing contract-compliant adaptation of the protection level and thus an ideally successive improvement of the level is a practical example of the Member State competition for the best level of protection in

²⁴⁹Kotzur, in Geiger/Khan/Kotzur, EUV/AEUV, art. 169 para. 7.

²⁵⁰Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 20; Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 605 para. 8.

²⁵¹Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 21.

²⁵²Micklitz/Reich, in EuZW 1992, p. 593 at p. 595 et seq.

the sense of a “best-practice “ explained in this part 2 under 3.2.3.2.

3.5.1.1.4 Art. 169 para. 2 lit. b) TFEU - possible competence title for Directive 2009/72/EC

Prerequisite for the adoption of Directive 2009/72/EC as a secondary legal act by the European Parliament and the Council of the European Union on a proposal from the European Commission is the existence of a corresponding competence for this purpose. The consumer protection, which falls under shared jurisdiction according art. 4 para. 2 lit. f), art. 2 para. 2 TFEU, authorized only to those measures listed in art. 169 para. 2 lit. b) TFEU and granted no further general competence, that would be incompatible with the principle of conferral under art. 5 para. 1 s. 1, para. 2 TEU. The adoption of the Directive must be based therefore on a corresponding primary legal basis.

The Directive 2009/72/EC is based on the Treaty establishing the European Community and in particular the freedom of establishment under art. 47 para. 2 EC Treaty (now art. 53 para. 1 TFEU), the freedom to provide services in accordance with art. 55 EC Treaty (now art. 62 TFEU) and the internal market competence according to art. 95 TEC (now art. 114 TFEU).²⁵³ Despite the present exemplary enumeration of competency standards art. 169 TFEU as a whole also its para. 2 lit. b) TFEU does not come into consideration as a basis of competence. Even if the consumer protection of the Union would be independent as a domestic market, which, however, as hereinafter will be explained is not the case, art. 169 TFEU would not represent an own competence standard for a single market independent consumer policy of the Union as previously explained in this part 2 under 3.5.1.2.2.²⁵⁴

Therefore, art.169 para. 2 lit. b) TFEU ruled out as a basis of competence for the adoption of Directive 2009/72/EC.

²⁵³Directive 2009/72/EC under the notes for reference.

²⁵⁴Paschke/Husmann, in GPR 2010, p. 262 at p. 263.

3.5.1.2 Relationship of possible competence titles to each other

Art. 114 TFEU is applicable only in the case, where no special alignment competency standard is relevant. It requires therefore a discussion of the relationship between art. 169 para. 2 lit. a) TFEU and art. 114 TFEU as well as a clarification of the question of how art. 115 TFEU and art. 114 TFEU behave to each other. After all, the internal market competence is to be used as the sole legal basis only in this case if the act, which is adopted, the functioning of the internal market is in the foreground and this is objectively improved, so therefore a positive internal market effect is achieved.²⁵⁵

The energy legal competence title of art. 194 TFEU was introduced for the first time after already successful entry into force of Directive 2009/72/EC; hence, the relationship between art. 194 para. 2 subpara. 1 TFEU to art. 114 TFEU has to be clarified.

The answer to this question is for the Directive 2009/72/EC subsequent Directives of importance.

3.5.1.2.1 Relationship of art. 114 TFEU to art. 115 TFEU

Art. 114 TFEU displaced as a specific alignment standard the general rule contained in art. 115 TFEU. Although the current art. 115 TFEU originally was the sole general competency standard for alignment the present art. 114 TFEU was created in 1987 with the Single European Act²⁵⁶ as a special provision to this regulation.²⁵⁷ Now art. 115 TFEU, which permits only acts in the meaning of art. 288 TFEU and requires an unanimous Council decision, is merely of concern referred to matters carved out by art. 114 para. 2 TFEU and only insofar as the Treaties have not provided a special competence for this purpose as in the field of direct taxation. As the consumer protection does not fall under the exceptions of art. 114 para. 2 TFEU art. 115 TFEU is eliminated as a possible competence title.

²⁵⁵Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 528 para. 29.

²⁵⁶Single European Act, OJEC L 169, 29/6/1987, p. 1.

²⁵⁷Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 521 para. 8.

3.5.1.2.2 Relationship of art. 169 para. 2 lit. a) TFEU to art. 114 TFEU

According to art. 169 para. 2 lit. a) TFEU the Union contributes to the attainment of the objectives set out in art. 169 para. 1 TFEU by legal harmonization measures adopting in the context of the completion of the internal market pursuant to art. 114 TFEU. The consumer protection law rule thus fully refers to the internal market competence in art. 114 TFEU²⁵⁸ as a shared competence in the meaning of art. 4 para. 2 lit. a) TFEU.

A concept represented in the literature²⁵⁹ that such measures, that may also serve the internal market but primarily fulfill consumer policy may be based also on art. 114 TFEU, is to be rejected. This approach is not covered by the wording of art. 169 para. 2 lit. a) TFEU; further this approach would run counter to the logic of art. 169 para. 2 lit. b) TFEU as explained earlier in this part under 3.5.1.1.2, after which the Union only plays a limited role in the context of the fulfillment of the consumer protection objectives towards the Member States.²⁶⁰ The Union should therefore realize the required contribution under art. 169 para. 1 TFEU to the protection of consumers primarily through legislative alignment measures for the internal market achievement. The content objective and design of the European consumer protection depends therefore strictly on EU conception of the creation of a functioning internal market²⁶¹; due to this link the provision purports a single market-oriented consumer policy²⁶², so that the protected consumer interests are co-defined by the internal market objective.²⁶³

Therefore, art. 169 para. 2 lit. a) TFEU creates no powers at all beyond the internal market competence, so it can only be used accessorially to the internal market policy in accordance with the legal bases of the Community in terms of a complementary function.²⁶⁴ The provision is binding

²⁵⁸Rösler, in EuR 2008, p. 800 at p. 805.

²⁵⁹Lurger, in Streinz/Ohler, EUV/EGV, art. 153 para. 33; Micklitz/Reich, in EuZW 1992, p. 593 at p. 594.

²⁶⁰Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 16; Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 35.

²⁶¹Steindorff, in ZHR 150 (1986), p. 687 at p. 697.

²⁶²Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 5.

²⁶³Dausen, in EuZW Heft 14-15/1995, p. 425; Krebber, in Calliess/Ruffert, EUV/AEU, art. 169 para. 18.

²⁶⁴Paschke/Husmann, in GPR 2010, p. 262 at p. 263; ECJ C-192/94, El Corte Inglés/Blázquez Rivero (7/3/1996), E.C.R. I-1281, para. 19 et seq.

only those measures, that may be adopted in the context of art. 114 TFEU with relevance for consumer protection, on the objectives of para. 1; the consumer protection regime has therefore from a competence perspective a merely declaratory function, where it has to be clarified in the sense of a market-specific cross-sectional clause, that measures under art. 114 TFEU must contribute to achieve a high level of consumer protection and have to promote the interests of consumers.²⁶⁵

Therefore, art. 169 para. 2 lit. a) TFEU ruled out as a separate competence title.

3.5.1.2.3 Relationship of art. 194 para. 2 subpara. 1 TFEU to art. 114 TFEU

At the time of promulgation of Directive 2009/72/EC on 14 August 2009, came into force on 3 September 2009, the Union had no own legal energy competence title. This was for the first time introduced with the entry into force of the Treaty of Lisbon on 01 December 2009. Thus, the question arises whether art. 194 para. 2 subpara. 1 TFEU as an energy-specific competence title for harmonization of the internal energy market now displaces the general competence title of art. 95 of the TEC (now art. 114 TFEU), which was used so far as the basis of competence to adopt the Directive 2009/72/EC, insofar as this relates to energy policy objectives. For, ensuring the functioning of the energy market is listed as a target in art. 194 para. 1 lit. a) TFEU. This would, for example, also cover the regulatory law including unbundling provisions shown in part 1 under 2.5.3.1.

It is clear already after its wording that art. 194 para. 1 lit. a) TFEU displaces as a specific competence with regard to energy policy, which also refers to ensuring the energy market, the non-specific competency standards as the internal market competence according to art. 114 TFEU completely.²⁶⁶ For, the energy market recourses only to a section of the internal market, which has now become independent by art. 194 TFEU referred to the competence.²⁶⁷ With this newly

²⁶⁵Pfeiffer, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 169 para. 33; Berg, in Schwarze, EU-Kommentar, art. 153 EGV para. 15.

²⁶⁶Schneider, in Schneider/Theobald, Recht der Energiewirtschaft, § 2 p. 48 para. 10; Gundel, in EWS 2011, p. 25 at p. 29; Kahl, in EuR 2009, p. 601 at p. 617 et seq.; Rodi, in Vedder/Heintschel v. Heinemann, Europäischer Verfassungsvertrag, art. III-256 para. 3; Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 529 para. 40.

²⁶⁷Kahl, in Schulze-Fielitz/Müller, Europäisches Klimaschutzrecht, p. 60.

introduced specific competence norm a subsequent Electricity Directive of Directive 2009/72/EC would, therefore, not as before based on art. 95 of the TEC (art. 114 TFEU), but on the aforementioned art. 194 TFEU insofar as this relates to the energy market-related alignment.

Further, it is questionable whether this would apply also in relation to the alignment competence of the EU insofar as this refers to the consideration of consumer protection objectives according to art. 169 para. 2 lit. a) TFEU concerning the internal electricity market by Directive 2009/72/EC or whether in this case the internal market competence and thus as in the past the art. 95 TEC alternating art. 114 TFEU would be applicable.

Against this latter approach speaks the fact that as mentioned in this part 2 under 3.5.1.2.2 the objective of improving the consumer protection should be tracked in addition primarily in the context of the internal market realization. Consumer protection is thus subordinate to the level of the Union internal market objective and has so far being limited to market complementary objectives.²⁶⁸ It follows that consumer protection as a "appendage" would not follow in the future the general internal market competence of art. 114 TFEU but rather the area specific internal energy market competence within the meaning of art. 194 TFEU, which is to be regarded as a more specific regulation in relation to art. 114 TFEU. This objective of ensuring the functioning of the energy market in accordance with art. 194 para. 1 lit. a) TFEU also comprises competitive measures, which presuppose the existence of a market disruption; the term "market disruption", which is interpreted broadly, comprises in addition to cases of allocative market failure also distributive disturbances of the competition results, so that even rules to protect consumers or socially vulnerable citizens may be supported on this target.²⁶⁹ That conclusion is not changed by the reference in art. 169 para. 2 lit. a) TFEU to art. 114 TFEU; instead this scheme, i.e. art. 114 TFEU, is substituted by the more specific provision of art. 194 TFEU, so that those measures, which are adopted in the context of art. 194 para. 2 subpara. 1 TFEU with relevance for consumer protection, are tied to the objectives of art. 169 para. 1 TFEU, therefore must contribute to achieve a high level of consumer protection and promotion of consumer interests in the energy market.

Thus, subsequent to Directive 2009/72/EC following Directives would be supported in the future on

²⁶⁸Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 18.

²⁶⁹Calliess, in Calliess/Ruffert, EUV/AEUV, art. 194 para. 11.

the more specific competence provision of art. 194 TFEU, which proceeds the previous competence basis of art. 114 TFEU and displaces this as a more specific provision in relation to the aforementioned objective of ensuring the functioning of the energy market.

Inasmuch as only the general alignment competence of art. 114 TFEU could be used by the EU legislator in relation to the relevant Directive 2009/72/EC due to the non-existence of art. 194 TFEU the conditions of art. 114 TFEU will be explained both generally and by the example of this Directive.

3.5.2 Alignment competence (art. 114 TFEU) by the example of Directive 2009/72/EG

Numerous measures of EU law in the meaning of art. 288 TFEU can be justified with the alignment competence of art. 114 TFEU. Also on the predecessor provision of this title, namely art. 95 TEC, the Commission has adopted Directive 2009/72/EC alike as Directive 2003/54/EC and Directive 96/92/EC.

It is striking, that the adoption of Directive 2009/72/EC expressly, among other things, refers to the freedom of establishment under art. 47 para. 2 of the EC Treaty (now art. 53 para. 1 TFEU) and the freedom to provide services in accordance to art. 55 of the EC Treaty (now art. 62 TFEU) as fundamental freedoms, which are to ensure also in accordance with the completion of the internal market in electricity after art. 26 para. 2 TFEU. It requires first a clarification of the principles to the so-called horizontal division of powers.

The horizontal division of powers resolves the choice of the relevant legal basis in the Treaties provided for the adoption of a legal basis. This choice of the legal basis of a legal act must be based on objective factors amenable to judicial review within the framework of the EU competence system.²⁷⁰ These include in particular the content and the aim of the act.²⁷¹ Provided that in a case

²⁷⁰ECJ C-189/97, *European Parliament v. Spain* (8/7/1999), E.C.R. I-4741, para. 25; Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, p. 229 para. 491.

²⁷¹ECJ C-300/89, *Commission v. Council, Titanoxid* (11/6/1991), E.C.R. I-2867, para. 10; ECJ C-491/01, *British American Tobacco* (10/12/2002), E.C.R. I-11453, para. 93; ECJ C-42/97, *Parliament v. Council* (23/2/1999), E.C.R. I-869, para. 36.

multiple legal bases are considered the legal act is to support according to the case law of the ECJ on the legal basis, which covers the main objective of this act.²⁷² It follows when in determining the appropriate legal basis only minor objectives are not considered. A secondary legislative act may be based exceptionally on several competency standards when this legislative act pursued two equally important objectives, which are inextricably linked.²⁷³ If the EU legislator has chosen a wrong legal basis the corresponding secondary legislation can be attacked and annulled by the ECJ with effect *ex tunc*; until then, however, there is a presumption of validity.²⁷⁴ In case of an annulled secondary legal act the ECJ can order, where necessary, according art. 264 para. 2 TFEU especially for weighty reasons of legal certainty that the effects of the act are to be considered fully or at least partially as further valid by the EU legislator until the entry into force of the new provision.²⁷⁵

The justification of the appeal on the freedom of establishment and the freedom to provide services is likely to result from the rules contained in the Directive 2009/72/EC on the authorization of generation plants on the one hand and from the different classification of electricity supplies as service or delivery of goods²⁷⁶ respectively from the fact, that the areas of regulation contained in the Directive concerning the electricity supply do not only include the delivery of electricity on the other hand.²⁷⁷

The provision of art. 114 TFEU, which is examined in this work, as a possible central competence standard in relation to Directive 2009/72/EC allows measures for the approximation of laws, regulations and administrative provisions of the Member States, which have the establishment and functioning of the internal market as their object. Art. 1 para. 1 Directive 2009/72/EC refers besides the electricity generation, transmission, distribution and supply also to the consumer protection. The Directive 2009/72/EC is therefore designed as an energy sector-specific Directive, that includes,

²⁷²ECJ C-491/01, *British American Tobacco* (10/12/2002), E.C.R. I-11453, para. 94; ECJ C-42/97, *Parliament v. Council* (23/2/1999), E.C.R. I-869, para. 40.

²⁷³ECJ C-300/89, *Commission v. Council, Titanoxid* (11/6/1991), E.C.R. I-2867, para. 17; ECJ C-42/97, *Parliament v. Council* (23/2/1999), E.C.R. I-869, para. 38, 42.

²⁷⁴ECJ C-101/78, *Granaria* (13/2/1979), E.C.R. 623, para. 4; Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, p. 231 para. 495.

²⁷⁵ECJ C-271/94, *Parliament v. Council* (26/3/1996), E.C.R. I-1689, para. 39 et seq.; Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, p. 231 para. 496.

²⁷⁶See footnote 37.

²⁷⁷Neveling, in *Danner/Theobald, Europäisches Energierecht*, Bd. 2 Einf. B para. 219.

among other things, consumer protection rules, and specifically refers to the applicability of the consumer protection legislation of the Union²⁷⁸ in order to care from the perspective of consumer protection legislation for the improvement and integration of the embossed competitive electricity market in the Union.

3.5.2.1 Requirements of art. 114 TFEU

As represented previously in this part 2 under 3.2.2.3 a fragmented consumer protection law exists in the internal electricity market at the level of Member States at the time of entry into force of Directive 2009/72/EC; in relation to Directive 2009/72/EC there is therefore a compelling need for alignment as explained in this part 2 under 3.2.3.4. Furthermore, as previously shown in this part 2 under 3.5.1.2.2 art. 169 para. 2 lit. a) TFEU does not represent an own competence norm, but refers entirely to the internal market competence of art. 114 TFEU, whose conditions are explained below in relation to the Directive 2009/72/EC.

3.5.2.1.1 Principle of conferral

The alignment competence of art. 114 TFEU, which falls under the shared competence by art. 4 para. 2 lit. a), art. 2 para. 2 TFEU, authorizes only on the approximation of Member State legislation and grants no general power to regulate the internal market²⁷⁹, which would be incompatible with the principle of conferral under art. 5 para. 1 s. 1, para. 2 TEU. For, according to this principle a appropriate primary legal basis is necessary for the action of the Union. The principle aims at the question, whether the Union can operate, i.e. the so-called "question of being allowed".²⁸⁰ In contrast to the Member States the Union has no so-called "competence of competence" to grant itself new powers, what art. 5 para. 2 s. 2 TEU right away shows.²⁸¹

However, if the Union in relation to the internal market competence as a shared competence under

²⁷⁸Art. 3 para. 7 in conjunction with Annex I para. 1 s. 1 Directive 2009/72/EC, where reference is made to the applicability of consumer protection regulations by exemplary reference to the Directives 97/7/EC (see footnote 136) and 93/13/EEC (see footnote 135).

²⁷⁹Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 6.

²⁸⁰Tonner/Tamm, in JZ 2009, p. 277 at p. 285.

²⁸¹Frenz/Ehlenz, in EuZW 2011, p. 623.

art. 4 para. 2 lit. a), art. 2 para. 2 s. 2 TFEU has exercised its competence and the following requirements according art. 114 TFEU for the action of the Union are given, the Union acts in accordance with the principle of conferral.

3.5.2.1.2 Internal market related alignment

Only such measures are covered by the alignment competence according art. 114 TFEU, that meet all the requirements of art. 114 TFEU, whose main purpose is therefore the completion so the establishment and functioning of the internal market²⁸²; therefore, it may not be a mere side effect here. Even the mere existence of a danger can justify an approximation by art. 114 TFEU²⁸³ under the condition alike the disparities in the various legal systems of the Member States are liable to hinder the fundamental freedoms within the Union.²⁸⁴ However, as a condition of such a preventive law approximation the occurrence of such a danger must be likely and the measure in question must be designed to prevent the entry.²⁸⁵

Thus, the measure must have an objective reference to the single market and is also used subjectively to achieve an approximation of laws.²⁸⁶ This aim must arise from the act objectively and actually²⁸⁷, which must be considered in the recitals of the respective act.²⁸⁸

Prerequisite for the opening of the scope of the internal-market alignment competence according art. 114 TFEU is the presence of hazards or barriers. Here, actual barriers of fundamental freedoms or

282ECJ C-376/98, Federal Republic of Germany - Tobacco Advertising I (5/10/2000), E.C.R. I-8419, para. 84; Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 16.

283ECJ C-300/89, Commission v. Council, Titanoxid (11/6/1991), E.C.R. I-2867, para. 15; ECJ C-350/92, Spain v. Council (13/7/1995), E.C.R. I-1985, para. 32.

284ECJ C-350/92, Spain v. Council (13/7/1995), E.C.R. I-1985, para. 33, 35.

285ECJ C-376/98, Federal Republic of Germany - Tobacco Advertising I (5/10/2000), E.C.R. I-8419, para. 86; ECJ C-58/08, Vodafone (8/6/2010), E.C.R. I-4999, para. 33; ECJ C-380/03, Federal Republic of Germany v. Parliament/Council (12/12/2006), E.C.R. I-11573, para. 83; Tamm, in VuR 1/2012, p. 3 at p. 6.

286ECJ C-376/98, Federal Republic of Germany - Tobacco Advertising I (5/10/2000), E.C.R. I-8419, para. 84, 95; Grigoleit, in AcP 210 (2010), p. 354 at p. 364 et seq.

287ECJ C-217/04, United Kingdom v. Parliament (2/5/2006), E.C.R. I-3771, para. 42.

288ECJ C-217/04, United Kingdom v. Parliament (2/5/2006), E.C.R. I-3771, para. 59 et seq.

appreciable competition disabilities are considered while a cumulative presence of these facts is not required.²⁸⁹ The competition disability must be noticeable. A recourse to art. 114 TFEU also to eliminate only minor competition disparities would, however, be incompatible with the principle of conferral; the jurisdiction of the European Union legislature would be practically limitless in this case.²⁹⁰ The target and thus the purpose of the relevant acts of harmonization must be therefore to reduce on the one hand existing internal market barriers and to eliminate on the other hand the risk that differences between competition of the various Member States cause or maintain noticeable distortions of competition or barriers to the free movement of goods or services.²⁹¹ Alignment measures must therefore contribute to improving the conditions concerning the establishment and functioning of the internal market²⁹², which is to be determined by an overall view.

If these conditions for approximation of laws under art. 114 TFEU are relevant it is irrelevant whether in addition other subjects, in which the Union only contributes to the policies of the Member States - as in the area of consumer protection under art. 169 para. 2 TFEU - are regulated also.²⁹³ The consumer protection as a cross-sectional area is about art. 169 para. 2 lit. a) TFEU on the basis of art. 114 TFEU an essential object of acts of harmonization; this is especially true for rules to protect the economic interests of consumers particularly in the areas of the movement of goods and supply of services.²⁹⁴

289Von Danwitz, in Dausies, Handbuch des EU-Wirtschaftsrechts, art. 114 para. 117 et seq.; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 22; Möstl, in EuR 2002, p. 318 at p. 324; Herr, in EuZW 2005, p. 171 at p. 173; ECJ C-380/03, Federal Republic of Germany v. Parliament/Council (12/12/2006), E.C.R. I-11573, para. 67.

290Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 8; ECJ C-376/98, Federal Republic of Germany - Tobacco Advertising I (5/10/2000), E.C.R. I-8419, para. 106 et seq.

291ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 60.

292Khan, in Geiger/Khan/Kotzur, EUV/AEUV, art. 114 para. 14, 16; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 24; Federal Republic of Germany - Tobacco Advertising I (5/10/2000), E.C.R. I-8419, para. 83 et seq., 95.

293Frenz/Ehlenz, in EuZW 2011, p. 624; ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 62, where reference is made to the protection of health by art. 152 para. 1 TEC (now art. 168 para. 1 TFEU).

294Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 12.

3.5.2.1.3 Requirements of art. 114 TFEU from the viewpoint of Directive 2009/72/EC

Directive 2009/72/EC adopted on the basis of the internal market competence title must actually have the purpose both to improve the conditions for the establishment and functioning of the internal market as a whole and to promote this goal.²⁹⁵ The legislature has therefore the duty of both to detect a single market impairment and to substantiate objectively comprehensible that the Directive 2009/72/EC is designed to eliminate this impairment; this requires the so-called “necessity principle” according to art. 114 TFEU.²⁹⁶ The competence of the Union consists therefore not only of the elimination of existing impacts on the internal market, but also in the adoption of regulations in place of the Member States for the removal of barriers to competition, wherein in this case also such restrictions can be made, that are required for reasons of public interest.²⁹⁷

Therefore, it is to clarify whether the Directive 2009/72/EC fulfills all the requirements of art. 114 TFEU and with that the main purpose of this provision of realization, i.e. establishment and functioning of the internal market.

3.5.2.1.3.1 Existing obstacles before the entry into force of Directive 2009/72/EC

At the time of the entry into force of Directive 2009/72/EC obstacles to the sale of electricity in the Union on equal terms without discrimination or disadvantage were noted; in particular an effective level of regulatory supervision and a non-discriminatory network access was not yet available in all Member States.²⁹⁸ Discrimination in the context of network access granted by the network operator disables immediately electricity supplier, which are necessarily dependent on a non-discriminatory network access to supply their own customers with electricity as part of a so-called "all-inclusive contract package"²⁹⁹ in the grid area of the network operator; along the cascade over the electricity

²⁹⁵ECJ C-58/08, Vodafone (8/6/2010), E.C.R. I-4999, para. 32; ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 60; von Danwitz, in Dausen, Handbuch des EU-Wirtschaftsrechts, art. 114 para. 116.

²⁹⁶Leible, in Streinz/Ohler, EUV/EGV, art. 94 para. 36.

²⁹⁷Möstl, in EuR 2002, p. 318.

²⁹⁸Directive 2009/72/EC – recital (4).

²⁹⁹Under a so-called “all-inclusive contract package“ the customer contracts usually both the supply and the network side with a electricity supplier of his choice; this supplier regulates in turn the network side namely the use of the network with the network operator in its network area, where the customer related connection points are. This

supplier equally the right of the customer to participate actively in the competition and thus its promotion would be thwarted thus in cases of such a discrimination of the supplier by the network operator from the very beginning. The granting of a non-discriminatory access to the network is a basic requirement in order to initiate competition also for customers at the distribution level and opening up the possibility for electricity traders and equally customers to take actively part as market participants in the internal electricity market.

The Commission took the view that the objective of Directive 2009/72/EC “namely the creation of a fully operational internal electricity market cannot be sufficiently achieved at the level of the Member States and can therefore be better achieved at Community level” in accordance with the principles of subsidiarity and proportionality.³⁰⁰ In this regard, the European Parliament underlines that an effective and improved consumer protection is necessary in order to achieve a better functioning internal market.³⁰¹

Although the Directive 2003/54/EC already made a significant contribution to the creation of the internal electricity market³⁰² the Community considers nevertheless obstacles to the sale of electricity in the community on equal terms without discrimination or disadvantage.³⁰³ After Directive 2009/72/EC a guarantee of the so-called fundamental freedoms requires a fully open market, which enables the consumers on the one hand to choose their suppliers freely and on the other hand all suppliers to deliver to their customers freely.³⁰⁴ According to art. 3 para. 4 s. 2 Directive 2009/72/EC the Member States shall take all necessary measures to prevent discrimination against a supply company, which is approved as a trader in another Member State.

procedure is common – with exception of the industrial customer wholesale side – in particular concerning the household customer segment. Wholesale customers partially contract in deviation from the “all-inclusive contract package” exclusively the supply side with the supplier while the network side is contractually managed by the wholesale customer itself with the network operator. In contrast to the first mentioned principle, where the electricity supplier is the network customer, the wholesale customer uses in the aforementioned exceptional case the network itself as a network customer and would thus directly discriminated in the case of a network access disability.

300Directive 2009/72/EC – recital (62).

301European Parliament resolution of 20 May 2008 on EU consumer policy strategy 2007-2013 (2007/2189(INI), OJEC C 279 E, 19/11/2009, p. 19 no 9.

302Directive 2009/72/EC – recital (2).

303Communication from the Commission to the Council and the European Parliament - Prospects for the internal gas and electricity market, COM(2006) 841 final, p. 7.

304Directive 2009/72/EC – recital (3).

This protection of the supply side, i.e. the energy trader side, to eliminate a possible restriction of competition affects both the demand side so end customers and thus also benefits consumers.³⁰⁵ It is expressly required by the Union legislature in the Directive 2009/72/EC that the existing consumer rights need to be strengthened as well as guaranteed and should include greater transparency.³⁰⁶

Due to existing and henceforth non excludable competition obstacles the internal market reference in relation to the Directive 2009/72/EC within the meaning of art. 114 TFEU exists also in relation to the existence of significant barriers to competition and barriers in relation to the free movement of goods with the consequence of impeding cross-border energy trade. The scope of an energy internal market-related competence of legal approximation within the meaning of art. 114 TFEU, which serves also the protection of the economic interests of consumers, is thus opened.

3.5.2.1.3.2 Removing existing obstacles by Directive 2009/72/EC

Because the allocation of the competence in the sense of art. 114 TFEU as previously explained in this part 2 under 3.5.2. 1.2 is final or functional aligned measures in flanking areas such as consumer protection are covered by art. 114 TFEU under the condition that they are actually pursue on the content and purpose the goal alike to improve the establishment and functioning of the internal market.³⁰⁷

The Directive 2009/72/EC pursued as a priority holistic goal to improve the internal electricity market and consequently, for example, to open new business opportunities for companies through the promotion of cross-border trade in order to achieve efficiency gains, competitive prices and higher standards of service in this way and contribute to greater security of supply and sustainability; in addition, the Directive aims to deliver a real choice for all private and commercial consumers of the EU.³⁰⁸ It should be noted, among other things, on the importance of promoting cross-border transactions to improve freedom of choice and the role of competition policy and

³⁰⁵Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, p. 113 et seq.

³⁰⁶Directive 2009/72/EC – recital (51).

³⁰⁷Kahl, in Calliess/Ruffert, *EUV/AEU*, art. 114 para. 25; Kamann, in *ZEuS* 2001, p. 113 et seq.

³⁰⁸Directive 2009/72/EC – recital (1).

education about responsible consumption in ensuring that consumers have the best options in terms of price, quality and variety in particular with respect to universal service such as energy and it is also stressed that in particular enhanced liberalization of the services market is needed to promote competition and thereby provide consumers with lower prices.³⁰⁹

Furthermore, according to Directive 2009/72/EC the public service requirements including the universal service and the resulting common minimum standards need to be further strengthened to make sure that all consumers especially vulnerable ones are able to benefit of competition and fair prices.³¹⁰ The alignment competence under art. 114 TFEU also includes the EU-wide uniform definition of public service obligations as services of general economic interest with the pursuit of the goal of reducing existing internal market barriers, i.e. in particular the aforementioned Member State obligation pursuant to the provision of universal service according art. 3 para. 3 Directive 2009/72/EC.³¹¹

Therefore, a close factual connection between the implementation of the energy sector-specific Directive 2009/72/EC integrated consumer protection law and the objective of completing the internal electricity market exists. Hence, measures in the field of the internal energy market³¹² also include the harmonization of laws as regulations to protect the consumer to the extent they relate to the protection of particular economic interests of consumers.

Due to the above mentioned at the date of entry into force of Directive 2009/72/EC still existing disabilities consumers would have to fear noticeably disadvantages in such Member States, which restrict competition in a prohibitive manner by an existing network access discrimination, that would not shut off without sufficient regulatory oversight. These disabilities would meet especially by the reaction of national expanded regulatory measures as well as regulatory powers as the

³⁰⁹European Parliament resolution of 20 May 2008 on EU consumer policy strategy 2007-2013 (2007/2189(INI), OJEC C 279 E, 19/11/2009, p. 21 no 26.

³¹⁰Directive 2009/72/EC – recital (5).

³¹¹Grill, in Lenz/Borchardt, EUV/EGV, art. 86 para. 25 et seq.; Schaub/Dohms, Der wettbewerbliche Binnenmarkt für Strom und Gas – Zur Rolle von Art. 90 Abs. 2 EGV, p. 7 footnote 29; Commission Decision of 12 December 1992 relating to a proceeding under Article 85 of the Treaty and Article 65 of the ECSC Treaty (IV/33/51 - „Jahrhundertvertrag“), OJEC L 50, 2/3/1993, p. 22 recital (28), where the Commission points out that the basic supply of electricity could be regarded as a service of general economic interest.

³¹²Herrmann, Europäische Vorgaben zur Regulierung der Energienetze, p. 81.

European Union legislature has codified now in art. 36 Directive 2009/72/EC with the aim of harmonizing in particular a non-discriminatory network access at Member State level; therefore, this includes such measures, that must be satisfied mandatory by national regulatory authorities.

Without effective regulatory oversight and therefore a regulated network access consumer interests can not be effectively enforced; under art. 36 lit. g), lit. h) Directive 2009/72/EC the national regulatory authority is responsible, among other things, for measures to promote effective competition and thus ensure consumer protection in particular by implementing high standards in the provision of universal service in the field of energy supply. The national regulatory authority contributes in accordance with art. 37 para. 1 lit. n) Directive 2009/72/EC together with other competent national authorities in particular with antitrust authorities that consumer protection law measures are enforced if necessary. To achieve this objective concerning an effective regulatory oversight and enforcement Member States have according art. 37 para. 13 Directive 2009/72/EC create appropriate measures and efficient mechanisms for the regulation, the control and the guarantee of transparency to prevent according art. 102 TFEU the abuse of a dominant position to the detriment of consumers as well as any predatory behaviour.

Directive 2009/72/EC aims to ensure through specific measures for the preventive sector in particular by developing and strengthening the regulatory oversight the functioning of the internal market also for the benefit of consumers by compensating due to the infrastructural features of the network-related electricity sector the market failures, that can not be remedied by competition alone, through an effective regulation ideally preventively (ex-ante), but if necessary by appropriate enforcement measures in the aftermath (ex-post).

The investigation on the example of the approximation of the updated regulatory measures and powers shows that the internal market reference is present in terms of the Directive 2009/72/EC by existing and henceforth non excludable competition disabilities also in relation to consumers to be protected by this Directive. To what extent the goal of improving consumer protection and the creation of a high level of protection is achieved by Directive 2009/72/EC is presented on the individual consumer-protection provisions of this Directive in part 3, where also the regulatory law in the context of consumer protection is shown in detail.

Consumer protection should allow in this context that all consumers in the wider remit of the

Community benefit from a competitive market.³¹³ For example, also the achievement of the objective of a cross-border electricity purchase not only in the industrial customer segment and thus the wholesale market, but also in the consumer sector, e.g. the household customer segment, requires a comparison of national rules in respect of the specific contractual power delivery modalities and thus necessarily postulates a corresponding right to approximate Member State laws.

3.5.2.1.4 High level of consumer protection, art. 114 para. 3 TFEU

As part of the alignment the EU legislative bodies are at the same time also legally obliged of producing a high level of protection in the field of consumer protection pursuant to art. 169 para. 1 in conjunction with para. 2 lit. a) TFEU³¹⁴; art. 114 para. 3 TFEU explicitly requires that in achieving harmonization a high level of consumer protection is guaranteed.³¹⁵

This commitment represents a special form of the consumer protection law cross-section clause under art. 12 in conjunction with art. 169 para. 1 TFEU and should ensure that this in the clauses presupposed high level of protection is achieved even with the alignment in the internal market.³¹⁶

After Directive 2009/72/EC, among other, SME and citizens of the Union, who benefit from the economic advantages of the internal market, should “enjoy a high level of consumer protection” also for reasons of fairness and competitiveness.³¹⁷ Therefore, the EU is neither obliged to adopt the highest level of protection found in a particular Member State nor to restrict itself without exception to the requirements of minimum standards.³¹⁸ Art. 114 para. 3 TFEU protects according to

³¹³Directive 2009/72/EC – recital (51).

³¹⁴Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 14; Herrnfeld, in Schwarze, EU-Kommentar, art. 94 EGV para. 38; Möstl, in EuR 2002, p. 318.

³¹⁵ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 62, where reference is made to the ensuring of a high level of protection of health by art. 152 para 1 subpara. 1 TEC (now art. 168 para. 1 subpara. 1 TFEU).

³¹⁶Borchardt, Die rechtlichen Grundlagen der Europäischen Union, p. 359 para. 816; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 33.

³¹⁷Directive 2009/72/EC – recital (42).

³¹⁸Krebber, in Calliess/Ruffert, EUV/AEUV, art. 169 para. 14; Riesenhuber, in JZ 2005, p. 829 at p. 831; other opinion Micklitz/Reich, in EuZW 1992, p. 593 at p. 594 et seq.; Reich, in ZEuP 1994, p. 381 at p. 398 et seq.

its purpose towards the Member States and their level of protection against a legal harmonization in the smallest denominator; the norm sets the standard of consumer protection as not absolutely, but is already showing through the plurality of the objectives set out that other objectives of the Union are always to be taken also into consideration.³¹⁹

Consumer protection is therefore to be considered in the context of balancing, where further goals of the Union such as the internal market are to be observed equally. The high level of protection is thus with regard to the protection of goods referred to in art. 114 para. 3 TFEU including the protection of consumers to bring in line with the other requirements of the establishment or safeguarding of the internal market and thus about the economic reasonableness of a measure.³²⁰ Conflicting objectives in the assessment process are to bring to a reasonable balance in the sense of a so-called practical concordance³²¹, i.e. the consumer protection objective in the internal energy market should not be implemented at the expense of other objectives such as the freedom to provide services and thus unilateral at their expense. Therefore, the internal market concept has a significant impact on the relevant interests of consumers, which are to some extent influenced thereby. In other words, art. 114 para. 3 TFEU assumes a high level of protection of the harmonization rules in particular in relation to the protection of consumers, with which therefore the area-specific responsibilities are to a certain extent consumed; so if a real improvement in the functioning of the internal market would not be detectable this would result the applicability of otherwise domain-specific responsibilities such as harmonization measures for the realization of the right of establishment or freedom to provide services under art. 50, 52 et seq., 59, 62 TFEU.³²²

The protection level determination is also subject to the dynamic conditions in the energy sector depending on the degree for the achieved legal harmonization for the internal electricity market completion. So, it is not a static process, in which via the aforementioned striking of compensation with the fundamental freedoms conflicting interests of consumers are to be brought to each other in line as far as possible.

³¹⁹Herresthal, in EuZW 2011, p. 328 at p. 329; Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 30, 33; Leible, in Streinz/Ohler, EUV/EGV, art. 95 para. 54 et seq.

³²⁰Von Danwitz, in Dausen, Handbuch des EU-Wirtschaftsrechts, art. 114 para. 125; Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 33.

³²¹See the reference in footnote 11.

³²²Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 528 para. 29, 33, 39.

Thus, for example, a conflict between the interests of the consumer exists on the one hand in terms of ensuring universal service³²³, which is under art. 3 para. 3 Directive 2009/72/EC mandatory for household customers and on the other hand in terms of as far as possible praiseworthy energy supply outside of the universal service, which is contrary to the basic supply more inexpensive; for this related to the household customer segment increased procurement risk, which further increased by e.g. an insolvency of a trader and a concomitant unpredictable legal assignment of household customers to the basic supply, is priced in and thus leads due to the procurement planning risks compared to the standard customer, who completes in contrast to the basic supplied household customer an energy supply contract with his energy supplier, generally at a higher price for the universal service. This conflict can be resolved by the customer is sensitized by relevant informations, which must be necessarily available for him already for reasons of consumer protection, to replace the legally guaranteed but basically more expensive universal service as quickly as possible by entering into an energy supply contract in the sense of art. 2 no 32 Directive 2009/72/EC – hereinafter also referred to as an energy contract - and thus by the use of a more inexpensive tariff of the current universal service provider or another energy supplier of his choice. The consumer would thus act in its own interest and would over and above support competition with its active participation in the market with the possibility to change the supplier.

The level of consumer protection is subject as this example shows depending on the case design so depending on the concrete situation to the requirement of a successive optimization, which occurs in addition to the promotion of competition and this in turn serves. Conflicts of this kind are to take note of in relation to the interests of consumers in the development of the content for consumer protection.³²⁴

323Müsgens/Steinhausen, Z Energiewirtschaft (2010) 34, p. 109 at p. 116 - among other things, the sales target sourcing strategy of electricity and gas quantities and thereby immanent risks are shown; the risks could be minimized optionally by way of actual scales volume control with household customers as opposed to the industry customer segment clearly defined contract completion dates are not given.

324Drexler, Die wirtschaftliche Selbstbestimmung des Verbrauchers, p. 438 et seq.

3.5.2.2 Subsidiarity and proportionality principles

The previously investigated alignment competence of the EU according art. 114 TFEU is limited by the principles of subsidiarity and proportionality; because despite the existence of the requirements of this competence title to the approximation of laws is to examine whether the EU can actually make use thereof and which exercise barriers are to be observed in this connection.

While maintaining the principle of subsidiarity firstly presupposes the authority of the Union to carry out the action so implies the "whether", the principle of proportionality clarifies the manner of the action so the "how".

3.5.2.2.1 Subsidiarity principle

Because of the non exclusive, but under art. 4 para. 2 lit. a) TFEU concerning the internal market as well as under art. 4 para. 2 lit. f) TFEU in the area of consumer protection codified shared competence, acts of harmonization by art. 114 TFEU must comply with the principle of subsidiarity in the meaning of art. 5 para. 1 s. 2, para. 3 TEU.

Thereafter, the Union is acting according art. 5 para. 3 TEU only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States either at central level or at regional and local level and can therefore by the reason of the scale or effects of the proposed action be better achieved at Community level.³²⁵ Conversely, Member States should remain responsible especially in those areas, that can not be better realized by a procedure of the Union than at Member State level. In principle the smaller unit i.e. the Member State enjoys over the Union as the larger unit priority in accordance with respect to its performance.³²⁶ The subsidiarity principle is intended to protect the Member States in their decision-making capacity therefore on the one hand. On the other hand the action by the Unions' institutions is justified by this principle thus legitimized and so avoiding an excess of European regulations.

With the "Protocol on the application of the principles of subsidiarity and proportionality", on

325ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 177.

326 Tamm, in VuR 1/2012, p. 3 at p. 6.

whose application by the institutions of the Union in art. 5 para. 3 subpara. 2 s. 1 TEU is pointed and which represents as part of the contracts under art. 51 TEU primary law of the Union, emphasis was put on this principle once again expressly. For, according to art. 5 para. 3 subpara. 2 s. 2 TEU the position of the Member States is improved insofar that their right is expressly stipulated to monitor compliance with this principle. This right corresponds logically with this in art. 4 para 1 of the aforementioned Protocol listed obligation of the European Union legislature to forward any draft of a legislative act to the national parliaments.

Objective under art. 1 s. 1 Directive 2009/72/EC is to care for the improvement and integration of the electricity markets characterized by competition also in the field of consumer protection in the Union by the adoption of common rules. This for a realization of the internal market in electricity indispensable prerequisite may not be sufficiently realized at the level of the individual Member States due to the existing regulatory fragmentation found in consumer protection law. This applies in particular to ensuring a comprehensive universal service, which also serves to protect the consumer as a public service obligation for the benefit of certain customer groups as provided for in art. 3 para. 3 Directive 2009/72 EC.

The securing common rules for a true internal energy market should therefore be one of the main goals of Directive 2009/72/EC.³²⁷ Hence, the European Union legislature clarifies that the objective of this Directive can not be sufficiently achieved by the Member States and can therefore be better achieved at Community level in accordance with the principle of subsidiarity.³²⁸ This approach is also in so far again emphasized by art. 3 para. 1 Directive 2009/72/EC as the Member States should ensure due to their institutional organization and with respect for the subsidiarity principle that electricity companies as defined in art. 2 no 35 Directive 2009/72/EC should be operated, among others, also with regard to the establishment of a competitive and safe electricity market. Therefore, the Member States are under an obligation to fulfill the objective of completing the internal electricity market.

A required alignment of different legal provisions of Member States referring to consumer protection, which would cause competition obstacles without such an approximation in the internal

³²⁷Directive 2009/72/EC – recital (60).

³²⁸Directive 2009/72/EC – recital (62).

market, can generally be carried out only by clear guidelines on EU level such as in relation to the obligation of Member States to guarantee universal services for specific groups of customers. In the case of full harmonization is to show in every single case that a fully harmonized regulation is necessary because the Member States can not realize the aims of the Directive in question.³²⁹ It must be noted, however, that full harmonization with the purpose of achieving the Directive objectives and a concomitant reduction of the already existing level of protection in some Member States would not be compatible with the principle of subsidiarity and would therefore not be compliant with European law.³³⁰

The Directive 2009/72/EC sufficiently justifies the meaningfulness of a single market harmonization and therefore respects the compliance with the principle of subsidiarity.

3.5.2.2.2 Proportionality principle

The principle of subsidiarity in the primary law is flanked also by the principle of proportionality³³¹, which is in contrast to the aforementioned principle of subsidiarity not only in the case of a shared but also in the case of an exclusive competence of the Union within the meaning of art. 3 in conjunction with art. 2 para. 1 TFEU applicable. Acts of harmonization under art. 114 TFEU must be proportionate, that means appropriate, necessary and reasonable according art. 5 para. 1 s. 2, para. 4 TEU.³³²

Even with the application of this principle the "Protocol on the application of the principles of subsidiarity and proportionality", to which art. 5 para. 4 subpara. 2 TEU refers, has to be considered.

The principle of proportionality constitutes in Union law a "barrier-barrier" of an EU competence by capturing the exercise of competence; this is not to be confused with the proposed limitation on

³²⁹Paschke/Husmann, in GPR 2010, p. 262 at p. 263.

³³⁰Paschke/Husmann, in GPR 2010, p. 262 at p. 264.

³³¹Tamm, in VuR 1/2012, p. 3 at p. 6.

³³²Herrnfeld, in Schwarze, EU-Kommentar, art. 95 EGV para. 29; Leible, in Streinz/Ohler, EUV/EGV, art. 95 para. 36; Kahl, in Calliess/Ruffert, EUV/AEUV, art. 114 para. 27; Reich, in VuR 2001, p. 203; ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 122; ECJ C-58/08, Vodafone (8/6/2010), E.C.R. I-4999, para. 51.

required measures with respect to the alignment of legislation in the internal market under art. 26 para. 1 TFEU, which is as explained earlier in this part 2 under 3.5.2.1.2 a factual precondition within the meaning of art. 114 TFEU.³³³

The principle of proportionality is only complied with if the required examination reveals the need for full harmonization, i.e. the pursued objective can not be equally or even better achieved through a Directive, that follows a minimum harmonization.³³⁴ The Directive as a less drastic measure, that leaves the Member States a higher degree of flexibility, basically enjoys priority compared with a Regulation. The European Union legislature expressly refers in Directive 2009/72/EC to the compliance with this in art. 5 TEU enshrined principle, according to which the Directive does not go beyond what is necessary in order to achieve that objective, i.e. the creation of a fully operational internal market in electricity and thus a competition without barriers also for the protection of consumers.³³⁵

The compliance with the requirement of proportionality according art. 5 para. 4 TEU is justiciable. The ECJ does not exclude the examination of the adequacy of the respective measure so a review of the relationship between goals and means, but applies this only in individual cases and with extreme caution.³³⁶ In a judicial review of these requirements the Union legislator would need to have a broad discretion, where a measure such as the Directive 2009/72/EC and its enshrined regulations would be unlawful under the condition that they are obviously not appropriate for attaining the objectives pursued.³³⁷

333Tietje, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, art. 114 para. 54.

334Leible, in Streinz/Ohler, EUV/EGV, art. 95 para. 37.

335Directive 2009/72/EC – recital (62).

336Nettesheim, in Oppermann/Classen/Nettesheim, Europarecht, p. 172 para. 33.

337ECJ C-491/01, British American Tobacco (10/12/2002), E.C.R. I-11453, para. 123; ECJ C-380/03, Federal Republic of Germany v. Parliament/Council (12/12/2006), E.C.R. I-11573, para. 145; ECJ C-58/08, Vodafone (8/6/2010), E.C.R. I-4999, para. 52.

3.5.3 Functions of alignment and consumer protection

Competitive barriers in the context of a cross-border energy trade are caused by different conditions as well as disadvantages and discrimination at Member State level, that existed at the time of adoption of Directive 2009/72/EC.³³⁸

An internal market related goal, which also serves to protect consumers, is therefore to ensure cross-border electricity supply within the EU. This requires an active consumer, who trusts the internal market and its requirements and uses this as a fact, that he actively participates as a market participant by conclusions of legal transactions in other Member States.

To achieve this goal approximation of legislation as described in this part 2 under 3.2.3 is required. The functions of alignment and thus its meaning for the consumer protection are shown below.

3.5.3.1 Approximation of laws – market benefiting function

The policy guidelines and their implementation into national law, therefore, pursue the goal to motivate the consumer to use its existing market opportunities to earn benefits. This by the legislature intended approach is supported expressly by the numerous consumer information obligations set out in the Directive 2009/72/EC Annex I and the additional reference to the Distance Selling Directive 97/7/EC and the Unfair Terms in Consumer Contracts Directive 93/13/EC. With these specifications the informed and protected consumer should be motivated to contract in particular also via the internet cross-border "online transactions" of the product electricity with energy traders from other Member States throughout Europe.

Different rules in individual Member States would, however, basically undermine consumer confidence and kill his willingness to participate in the competition of the internal market and thus to shape this actively from the beginning; in other words, the mature and prudent acting so active consumer will expect and demand a particularly high level of alignment related to the internal market in electricity.

³³⁸Directive 2009/72/EC – recital (4).

The alignment thus pursues the objective and assists the active consumer in taking advantage of the free competition of the internal market for himself and thus to contribute to the completion of the internal electricity market. The approximation of the laws intended therefore a market benefiting function by the protection of the active consumer.

3.5.3.2 Approximation of laws – market regulating function

Closely intertwined with this above mentioned consumer protection supporting market benefiting function is the market regulating function of alignment with the Unions' objective to make the internal market through a unified standard of consumer protection functional.³³⁹

Directive 2009/72/EC clarifies that a securing of common rules for a true internal energy market and a comprehensive, general available energy supply are part of the central policy objectives.³⁴⁰ Furthermore, after the policy goal of creating a fully operational internal electricity market can not be sufficiently achieved at the level of the Member States and can therefore be better achieved at Community level the European Union legislature notes that the Community may adopt measures in accordance with the principle of subsidiarity set out in art. 5 TEU under reference to compliance with the principle of proportionality.³⁴¹

This also applies in respect of these in the Directive 2009/72/EC securitized consumer protection regulations, with which the Union intends to achieve the objective of a high level of consumer protection. Accordingly, the Commission receives the power to adopt guidelines, that are necessary to achieve the attainment of the objective of this Directive, i.e. the creation of a fully operational internal electricity market and consequently a high level of consumer protection required minimum degree of harmonization.

The legislature explicitly refers to the need for legal approximation in the sense of minimum harmonization to achieve the aforementioned objective of a high level of consumer protection. The

³³⁹Hommelhoff, Verbraucherschutz im System des deutschen und europäischen Privatrechts, p. 1, according to which the protection of consumers is a central issue in the European internal market.

³⁴⁰Directive 2009/72/EC – recital (60).

³⁴¹Directive 2009/72/EC – recital (62).

alignment intended level of market regulating function to create an objective level playing field for all consumers and thus fair competition in the ideal case represents a mandatory requirement for this with the market-benefiting approximation intended purpose, which animates from a subject point the individual consumer to the active market participation; such over their rights and duties adequately informed consumers will be able and willing to play an independent part as market participants in the competition actively, e.g. in terms of obtaining an attractive power delivery offer by an energy trader, this in order to revive and so to promote also the objective of completing the internal market for electricity.

That between effective competition and consumer protection, which supports additionally by the alignment the interests of consumers with their market benefiting as well as market regulating function as a condition of a progressive internal energy market existing close mutually fructifying factual context, applies equally to the Directive 2009/72/EC. Effective competition and consumer protection are interdependent and are jointly required at a high level in all Member States to reach the announced target of the completion of the internal energy market.

3.5.4 Interim conclusion

With the former art. 129 a of the EC Treaty of Maastricht, which was updated via art. 153 of the EC Treaty of Amsterdam as now article 169 TFEU of Lisbon, the European Union legislature has actually codified for the first time an own internal market independent consumer protection competence title. Concerning this competence the policy of the Union is, however, limited to support, supplement and monitor measures merely and so subordinated to the policies of the Member States; art. 169 para. 2 lit. b) TFEU therefore justifies no final measures of the EU internal market.

In this regard, however, art. 169 para. 2 lit. a) TFEU refers to art. 114 TFEU as the relevant competence title for the single market legislative approximation; art. 169 para. 2 lit. a) TFEU itself represents no own competence standard. As a cross-sectional area consumer protection is thus controlled by the approximation measures under art. 114 TFEU as its essential object. This applies equally to the Directive 2009/72/EC, that contains as an energy sector-specific legal act in addition consumer protection rules. In the future art. 114 TFEU as a competence basis for acts of

harmonization will be displaced by the newly with the Treaty of Lisbon introduced area-specific competence basis of art. 194 TFEU concerning the energy sector as well as the consumer protection objectives relating to the internal energy market.

The requirements of art. 114 TFEU are present regarding the authorization for the approximation of national provisions relating to the adoption of the Directive 2009/72/EC. The necessity of the policy is to check on two levels, namely already on the factual level of art. 114 TFEU as well as within the framework of the principle of proportionality, which also flanks as a competence exercise barrier the principle of subsidiarity. The ECJ generally allows a wide margin of application regarding a final internal market approximation. This includes in particular obligations of general economic interest such as basic supply, which serves to protect consumers.

The alignment exerts two functions namely a market benefiting as well as a market regulating function to the consumers; these two functions, that support the active consumer in its participation in the competition and at the same time promote its protection, illustrate with respect to the Directive 2009/72/EC the context between effective competition on the one hand and consumer protection on the other hand; both together are necessary for the desired completion of the internal market for electricity at a high level.

The creation of a fully operational internal market in electricity at Member State level requires a functioning and effective consumer protection in addition to a functioning competition. With the objective of the elimination of significant barriers to competition and the removal of existing barriers in relation to fundamental freedoms through legislative approximation measures within its options of competences according to art. 114 TFEU the European Union legislature intends the completion of the internal electricity market.

4 PART 3 - CONSUMER PROTECTION LEGAL CONDITIONS, DISPUTE RESOLUTION AND REGULATION

The opening of the market can deliver the best prices, choice, innovation and service for consumers if it goes hand in hand with measures to guarantee trust, protect and support consumers to play the active role expected from them by liberalization.³⁴² Future action at European level will be after market mechanisms can not fully ensure consumers best interests focus on monitoring implementation and effective enforcement of consumer rights at national level, where necessary, strengthening and extending certain consumer rights.³⁴³

At the centre of the Directive 2009/72/EC, under its scope for the first time according art. 1 s. 1 also the consumer protection falls, should be consumer interests.³⁴⁴ For the first time art. 1 s. 3 Directive 2009/72/EC emphasized explicitly that the subject of the Directive is the determination of the obligation to provide universal services and the electricity consumer rights. Furthermore, the competition rules, which are clarified in the regulations of the Directive in detail, pointed out in this context. The legislature thus emphasizing the factual connection between consumer protection and competition already presented in the previous part 2 by applying to the purpose and scope of the entire Directive here.

The Commission in its communication "Towards an Energy Consumers Charter" has fixed four main goals namely the support of most vulnerable EU citizens in the event of energy price increases, improve minimum level of informations relating to supplier change including different supply options, reducing the burden on customers switching to other suppliers as well as protection from unfair selling practices; other important elements were considered, inter alia, the enforcement of consumer rights, access to adequate levels of energy as well as reasonable prices.³⁴⁵ From this

³⁴²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Energy 2020 - A strategy for competitive, sustainable and secure energy, COM(2010) 639 final, p. 12 et seq.

³⁴³Communication from the Commission – Towards a European Charter on the Rights of Energy Consumers, COM(2007) 386 final, p. 2.

³⁴⁴Directive 2009/72/EC – recital (51); in art. 1 s. 1 Directive 2003/54/EC as predecessor Directive the consumer protection was not listed.

³⁴⁵Communication from the Commission - Towards a European Charter on the Rights of Energy Consumers, COM(2007) 386 final, p. 5 et seq.

Charter of Energy Consumers, which was withdrawn by the Commission, some points have been included in the "Third Internal Energy Market Package" and thus also in the Directive 2009/72/EC; because with this adaptation in EU legal acts the Commission considers that a greater influence is guaranteed.³⁴⁶ The European Union legislature clarifies in art. 3 para. 7 s. 5 Directive 2009/72/EC with partial takeover of the aforementioned main objectives that the Member States ensure a high level of consumer protection particularly with respect to transparency regarding contractual conditions, general information and dispute settlement mechanisms.

The following should be examined against this background, to what extent in Directive 2009/72/EC codified consumer rights are appropriate, to guarantee these aforementioned target premises and thus a high level of consumer protection, i.e. in which manner the protection of consumers and thus the protection of their interests be taken into account in the energy sector-specific Directive 2009/72/EC and whether there is still a need for improvement, where necessary.

Furthermore, it is to clarify whether the State, which stands at the intersection of the market and should enable effective competition through the regulation of the natural network monopoly, also exercises a consumer protective effect by his right of regulation and which provisions of the Directive 2009/72/EC are due to such an effect.

The review is limited here to the essential immediately in the Directive enshrined sector-specific consumer rights as well as their differences, so the update in relation to the predecessor Directive 2003/54/EC. Any additional consumer rights, which are regulated outside the Directive 2009/72/EC in particular in general consumer protection-specific guidelines but nevertheless affect the consumer in its role as a participant in the electricity market, remain unaffected in this investigation. The energy sector-specific consumer rights to be examined are those, that serve to protect the economic interests of consumers by protecting their interests in particular by receiving adequate informations and preparation of transparency and enforcement of their rights.

³⁴⁶Opinion of the European Economic and Social Committee on „Energy poverty in the context of liberalization and the economic crisis“ (exploratory opinion), OJEC C 44/09, 11/2/2011, p. 56 no 6.5.

4.1 Basic supply, vulnerability, energy poverty

4.1.1 Basic supply, art. 3 para. 3 Directive 2009/72/EC

First will be investigated the provision of the basic supply regulated in art. 3 para. 3 Directive 2009/72/EC, which plays an outstanding role in the structure of this Directive. It is an energy sector-specific regulation, that has to consider carefully the balance between the necessary strengthening of competition and market forces on the one hand as well as necessary securing of access of all citizens in particular also the consumers to an affordable, high-quality basic supply on the other hand.³⁴⁷

Prior to the adoption of Directive 2009/72/EC the Commission in its Communication "Towards an Energy Consumers Charter" clarifies expressly that targeted universal and public service obligations for the benefit of consumers must remain at the heart of the market-opening process.³⁴⁸ Consequently, reference is made to the importance of the universal service and its obligation as an essential consumer protection law in numerous regulations in Directive 2009/72/EC.³⁴⁹

In this context the European Union legislature indicates that the universal service and the resulting common minimum standards need to be further strengthened to make sure that all consumers in particular vulnerable ones are able to benefit from competition and fair prices.³⁵⁰ It is clarified that the consumer, who - as shown in part 2 - contributes to effective competition, should also be beneficiary of this competition by appropriate in case of need protective measures.

4.1.1.1 Definition, scope

Pursuing to art. 3 para. 3 s. 1 Directive 2009/72/EC the universal service is legally defined as the right to be supplied with electricity of a specified quality at reasonable, easily and clearly

³⁴⁷Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - a quality framework of services of general interest in Europe, COM(2011) 900 final, p. 11.

³⁴⁸Communication from the Commission - Towards a European Charter on the Rights of Energy Consumers, COM(2007) 386 final, p. 4.

³⁴⁹Directive 2009/72/EC – recitals (37), (45), (50) and art. 1 s. 3, art. 3 para. 3, para. 15, art. 36 lit. h) and others.

³⁵⁰Directive 2009/72/EC – recital (50).

comparable, transparent and non-discriminatory prices.³⁵¹ The introduction of such minimum standards for certain customers follows the universal service concept of the Union.³⁵² The term "universal service" was first used at European level in the telecommunications sector and is now defined as a "minimum set of services of specified quality, which is available to all users regardless of their geographical location and in the light of specific national conditions, at an affordable price".³⁵³ Under art. 2 lit. h) of the Framework Directive 2002/21/EC users in the aforementioned sense are "natural and legal persons, who take or apply for a publicly available electronic communications service". Consumers as a group comprising the aforementioned generic term of the user, representing the type of natural persons according art. 2 lit. i) of the Framework Directive 2002/21/EC, which „use or apply for other than commercial or professional purposes" such a service.³⁵⁴ Concerning the personal scope of application in the electricity sector the meaning of this definition corresponds to the term "household customer" in the sense of art. 2 no 10 Directive 2009/72/EC.

This fundamental right to universal service was first anchored in the energy sector in the previous Directive 2003/54/EC³⁵⁵, with the aforementioned legal definition has been extended in the current Directive to "non-discriminatory prices". Accordingly, there is an obligation of equal treatment of basic supplied customers; the requirement of individual prices for the benefit of individual supplied customers deviating from the applicable universal service tariff would violate this prohibition of discrimination and would be therefore inadmissible. Hence, this legal supplement is necessary for clarification.

351See footnote 5.

352Lecheler/Gundel, in EWS 2001, p. 254.

353See art. 2 lit. j) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJEC L 103, 24/4/2002, p. 33 at p. 39; previously regulated in art. 2 para. 1 lit. g) Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunication with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJEC L 199, 26/7/1997, p. 32 at p. 36; first regulated in Council resolution of 7/2/1994 on universal service principles in the telecommunications sector, OJEC C 48, 16/2/1994, p. 2 lit. b.

354Communication from the Commission – services of general interest in Europe, COM(2000) 580 final, p. 18, where explicitly stated in the definition next to the term of the user also the notion of consumer; in this context the Commission also referred back to the telecommunications sector on the significance of specific universal service obligations as a important accompanying measure to market liberalization of service sectors such as the telecommunications sector.

355Art. 3 para 3 s. 1 Directive 2003/54/EC.

Another difference is that in contrast to the previous policy, where Member States had also referred to the household customers area only to "take care"³⁵⁶ for the provision of universal services, such is now "to ensure" under art. 3 para. 3 s. 1 Directive 2009/72/EC. The Union thus stresses the implementation of a basic supply in the sense of a mandatory obligation to Member States based on the household customer area and creates with this unambiguous regulation legal certainty concerning the clear order of implementation for the Member States.

From the predecessor Directive 2003/54/EC adapted provision of art. 3 para. 3 subpara. 2 Directive 2009/72/EC sets out clear about that any further provisions to be transposed by the Member States of universal service within the meaning of art. 3 para. 3 subpara. 1 Directive 2009/72/EC, i.e. the "how", have to be done in a transparent and non-discriminatory manner. The additional reference to art. 33 Directive 2009/72/EC represents a barrier inasmuch as the structure of the universal service, which is at the discretion of the Member States, should not lead to an obstruction of the market opening.

The legislature draws attention to a possible tension between universal service and the required market opening. The design of the universal service should therefore not result the foreclosure of the market, but also allow new suppliers and customers alike to participate in the competition in an open internal market. The national guarantee of universal services as a public service obligation and the ensuring of the market opening in terms of competition must be complementary, in that the universal service provider allows at EU level to its customers as consumers a free choice of a new supplier with the result of a concomitant change of the present supplier. Hence, it requires a mature and informed consumer, who is able to assess its economic benefits in the case of achieving a change of a supplier, which is to be implemented uncomplicated and non-discriminatory.

4.1.1.2 Universal service as a socio-political goal

Universal service concerns only the supply side and is thus independent of the generation and the network sector, over which the overall security of supply is guaranteed in the sense of an economic policy objective by ensuring an adequate and balanced energy generation on the one hand and by the functionality and performance of electricity networks on the other hand, the so-called sales area, in

³⁵⁶See art. 3 para. 3 s. 1 Directive 2003/54/EC.

which the customers and market participants are facing the current suppliers or distributors; ensuring the comprehensive universal service is in contrast to the generation and the network side pursuing security of supply as an economic objective to be regarded as an individual security of supply in the sense of a socio-political goal.³⁵⁷

The Union legislator obliges the Member States derogating from the principle of private autonomy to ensure the universal service for the benefit of household customers in the sense of a contract obligation. Therefore, the universal service provider can not deny universal service to the detriment of economically weak household customers. They are equally to protect by the Union under the order of the universal service obligation, which must be implemented mandatory by the Member States; the relevant contract obligation intended therefore as an appropriate and suitable means the effective protection of household customers as consumers.

From a contractual point of view it is necessary to distinguish strictly between the relationship of customers and network operators as well as the relationship between customers and suppliers. With the supplier, who is responsible for the supply by the meaning of art. 2 no 19 Directive 2009/72/EC, which means the sale including resale of electricity to customers, the customer closes an electricity supply contract, in which the supply conditions, i.e. in particular the price for delivery, are regulated. The network operator signs a contract with the customer as the connectee concerning the network connection side. For, a contractual arrangement in this regard is required because the network operator requires access to the endpoint of his network in the sphere of the connectee, so for connection.³⁵⁸

The network access is regulated between the supplier and the relevant distribution system operator - also referred to as distribution network operator or network operator - as defined in art. 2 no 6 Directive 2009/72/EC, who is responsible for the distribution of electricity within the meaning of art. 2 no 5 Directive 2009/72/EC. In this contract the network access conditions including the regulated network tariff for the network access paid by the supplier as network user within the meaning of art. 2 no 18 Directive 2009/72/EC are regulated. The remuneration of the

³⁵⁷Abel/Damjanovic/Holoubek/Holzinger, in JRP 2008, Heft 4, p. 219 at p. 223, where the differentiation with respect on the security of supply is shown schematically in form of a chart.

³⁵⁸Gundel, in GewArch 2012, p. 137 at p. 139 - in this analysis it is assumed that the customer is also the owner of the property connected to the public network and thus the connectee as well as the customer are same persons; in the case of existing rental or lease agreements the connectee and the network customer are not identical.

aforementioned electricity supply contract between the customer and the supplier consequently consists of two components, namely the price attributable to the supply side and the tariff attributable to the network side, which is also known as network charge or network access tariff; the supplier rolls the network access charge, which he has to pay to the network operator, on the customer.³⁵⁹ There is a triangle of contractual relationships, which are to be considered separately from each other also from the viewpoint of consumer protection.

4.1.1.3 Personal scope

With regard to the personal scope the Member States must ensure in any case under art. 3 para. 3 s. 1 Directive 2009/72/EC that all household customers within their territory receive a universal service. Therefore, a national obligation of implementation relative to this group of customers exists. However, if deemed appropriate Member States can also provide this universal service to small businesses; within the meaning of the statutory legal definition in the sense of art. 3 para. 3 s. 1 Directive 2009/72/EC these are enterprises, which employ fewer than 50 persons and whose annual turnover or annual balance sheet total not exceeding 10 million Euro. The EU legislature intends a minimum harmonization with the option for the Member States to reinforce the protection in relation to such small businesses in the above sense.

4.1.1.4 Obligation to connect and granting network access

Therefore, mandatory condition for ensuring universal service is to connect affected customers to the electricity network of the network operator on the one hand and to grant the universal service provider the network access by the relevant network operator on the other hand, which means the right of the universal service provider to use the network for the purpose supplying the customers by universal service. Accordingly, art. 3 para. 3 s. 1 Directive 2009/72 EC references as in the previous Directive³⁶⁰ on the general obligation of distribution companies to connect customers according to

³⁵⁹Only this constellation as regards household customers is assumed in this investigation; the other possible constellation, according to which the customer contracts the network access with the distribution network operator directly in its own name, so the supplier is not the contractual party of the distribution network operator, should not be considered. Basically only major customers as non-consumers make use of this option.

³⁶⁰See art. 3 para 3 s. 1 Directive 2003/54/EC, where reference is made to art. 23 para. 2 Directive 2003/54/EC, which substantially corresponds to art. 37 para. 6 Directive 2009/72/EC in turn.

certain conditions set out in art. 37 para. 6 Directive 2009/72/EC to the network of the network operator. Using the term "distribution undertaking" the legislature obviously refers back to in art. 2 no 6 Directive 2009/72/EC defined term "distribution system operator". The reference concerning the connection duty is related to the supply point, so connectee-related and thus generally customer-related. Possibly, the Union legislator wanted to point against this background of customization on this duty solely and did not want to reference in addition to the obligation to grant network access in favour of the universal service supplier as the provider. Against this intention of the legislator, however, speaks the in art. 3 para. 3 s. 3 Directive 2009/72/EC specified art. 37 para. 6 lit. a) Directive 2009/72/EC, where reference is made to both the obligation duty and the network access, whose conditions with respect to both obligations are determined or authorized ex-ante by the competent regulatory authority. In addition, the term "tariffs", which rather points to the network access than the mere power connector, for which no tariffs are to pay, speaks against this assumption. On the other hand art. 3 para. 3 s. 3 Directive 2009/72/EC applies to "customers" within the meaning of art. 2 no 7 Directive 2009/72/EC so not only to household customers but also to customers such as wholesale customers according art. 2 no 8 Directive 2009/72/EC. According to the legal definition within the meaning of art. 2 no 8 Directive 2009/72/EC this is a person, who purchases electricity for resale, so a electricity trader or supplier, the network access is to be granted by the network operator. Art. 3 para. 3 s. 3 Directive 2009/72/EC refers to both its wording as well as meaning and purpose likewise to the network access.

The obligation to grant a non-discriminatory network access represents a public service obligation equally as the implementation of the network connection duty within the meaning of art. 3 para. 2 Directive 2009/72/EC. For reasons of legal systematics and legal clarity, the content of art. 3 para. 3 s. 3 Directive 2009/72/EC, which relates to the network connection as well as the network access area as public service obligations, should be regulated in art. 3 para. 2 Directive 2009/72/EC with the aforementioned clarification. For those conditions and requirements concerning the network connection as well as the network access obligations as public service obligations in the sense of art. 3 para. 2 Directive 2009/72/EC are not only to ensure as a prerequisite concerning the universal service obligation without discrimination, but are also to ensure in the context of electricity supply, which goes beyond the universal service, to all other customers as well as to their suppliers.

4.1.1.5 Adequacy of universal service prices

In contrast to the general definition of the universal service obligation according the universal services are “made available at an affordable price”³⁶¹ the legal definition of universal services in the context of art. 3 para. 3 s. 1 Directive 2009/72/EC references on the term "reasonable prices". This in the telecommunications sector developed concept of "affordability", which is also applied in the context of postal services regulation, includes as opposed to the energy sector intrinsic concept "reasonableness" more detailed provisions to be observed concerning the required pricing criteria. In relation to the design of "affordability" the Commission has pointed out that the Member States have to take care for the practical implementation by means of price control mechanisms, that are to be measured by certain parameters such as price caps, geographical averaging or by distributing subsidies to the persons concerned.³⁶² In addition, the Universal Service Directive 2002/22/EC clarifies that the affordable price will be defined by the Member States at national level in the light of specific national conditions.³⁶³ Under art. 9 para. 2 Universal Service Directive 2002/22/EC the Member State option in this regard is shown to depart from those under normal commercial conditions provided offers in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service. Already it is seen that when assessing the affordability it depends on the horizon of the consumer and its income situation; "affordable" recourse to the addressee and thus the receiver paying for the universal service.

These criteria and therefore this scale can not be applied especially to the definition of the term "reasonableness" in the context of universal service prices in the electricity sector. The European Union legislature also uses the term "fair" price, which is obviously equated with "reasonable" price.³⁶⁴ After that is a reasonable price to be regarded as fair, that is offered equally to all customers based on universal supply. The determination of the adequacy of the price is primarily based on the service provider itself so the universal service provider and thus its own costs caused by the

³⁶¹See art. 3 para. 1 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2001 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJEC L 108, 24/4/2002, p. 51 at p. 59.

³⁶²Green Paper on Services of General Interest, COM(2003) 270 final, p. 18.

³⁶³Universal Service Directive 2002/22/EC – recital (10).

³⁶⁴Directive 2009/72/EC – recital (50).

guarantee of the provision of the universal service.

Accordingly, reference is made in Directive 2009/72/EC that EU citizens and, where Member States deem it appropriate, small enterprises should be able to enjoy public service obligations in particular with regard to security of supply and reasonable prices.³⁶⁵ The European Union legislature emphasizes here the mere guarantee of universal service as public service obligation and does not recourse in contrast to the universal service in the telecommunications sector such as in art. 9 of the Universal Service Directive 2002/22/EC on the protection of the consumer from the viewpoint of the price level of the basic supply. The Commission has already clarified that the inclusion of a sentence that "affordability" should be properly defined is not appropriate of a rule in a Directive.³⁶⁶ Although the pricing should be left to the Member States and consequently in the Universal Service Directive 2002/22/EC only indications so no specific pricing criteria are purported such indications should be made in a subsequent Directive concerning the electricity sector. Similarly as in the telecommunications sector the concept of "reasonableness" in the electricity sector should be replaced by "affordability". The view of the Commission is therefore to follow that the application of the principle of affordability helps to achieve economic and social cohesion in the European Union.³⁶⁷

However, it may be doubted whether the right of national regulatory authorities, which according to the newly introduced art. 37 para. 1 lit. j) Directive 2009/72/EC watch the prices for household customers and inform the national competition authorities about complaints from these customers as well as any competition distortions, actually enforce the protection of basic supplied household customers in terms of inappropriate, so concerning the level for universal services unjustified prices. This applies equally to the mere contribution, which the regulatory authority pursuant to art. 36 lit. h) Directive 2009/72/EC can provide, to achieve high standards in the provision of universal service.

³⁶⁵Directive 2009/72/EC – recital (50).

³⁶⁶Amended proposal for a Directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning rules for the internal markets in electricity and natural gas, amended proposal for a regulation of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity, COM(2002) 304 final, p. 5 et seq.

³⁶⁷Green Paper on Services of General Interest, COM(2003) 270 final, p. 38.

First, the European Union legislature in this regard has likely referred more to the mere security of supply and not to the amount of the payment of the price for the universal service; for, the legislator clarifies in this context that the Union citizens and small businesses - to the extent as optionally included in the scope of protection by the Member States under art. 3 para. 3 s. 1 Directive 2009/72/EC - must rely on the security of supply and appropriateness of prices in the context of public service obligations.³⁶⁸ Moreover, it is a review in the sense of ex-post control, with that the attempt should be made in the aftermath, to make a possibly required correction, for example, in the case of market failure.

It would be more goal-oriented to make a priori clear stipulations in particular by introducing the principle of affordability with the aim of improving the level of consumer protection by law to encourage the Member States right from the beginning in the context of the implementation into national law to take into account within a given narrow corridor certain premises in the fixing of a objectively justified price.

4.1.1.6 Supplier of last resort

According to art. 3 para. 3 s. 2 Directive 2009/72/EC the Member States may appoint a supplier of last resort to ensure the provision of universal service equally as after the predecessor Directive 2003/54/EC³⁶⁹. Supplier of last resort stands for a supplier, who is obliged to provide energy to final customers in emergency situations according to national legislation, when the chosen supplier does not or can not serve.³⁷⁰ This is also a regulation, that protects particularly consumers.

This function, for example, the sales division of a vertically integrated undertaking may exercise under the condition that the unbundling requirements are met.³⁷¹ It is therefore a margin of discretion in favour of the Member States with regard to the implementation of this Directive requirement, wherein also here pursuant to art. 3 para. 3 subpara. 2 Directive 2009/72/EC this

³⁶⁸Directive 2009/72/EC – recital (50).

³⁶⁹See art. 3 para. 3 s. 2 Directive 2003/54/EC.

³⁷⁰This corresponds to the definition of the European Regulators Group for Electricity and Gas (ERGEG): Best Practice Proposition Customer Protection (Ref; E05-CFG-03-06), 21/7/2006, p. 4.

³⁷¹Directive 2009/72/EC – recital (47).

requirement has to be implemented in a transparent and non-discriminatory manner without hindering the market opening within the meaning of art. 33 Directive 2009/72/EC. It should be ensured according to the purpose of the provision that customers particularly consumers in the case of insolvency of their electricity trader or especially economically vulnerable customers in the event of the unwillingness concerning the energy supply of an electricity trader nevertheless enjoy supply security of supply due to the protective mechanism of the universal service guaranteed by the Member States.

4.1.2 Vulnerability, energy poverty, art. 3 para. 7 Directive 2009/72/EC

However, it is questionable whether the aforementioned deficiencies can be possibly compensated according to the provision of art. 3 para. 7 Directive 2009/72/EC³⁷², where appropriate measures to protect final customers shall be taken by the Member States, by the fact that certain customer groups nevertheless enjoy protection due to the aforementioned provision, for example, in the case of high universal service prices. The provision of art. 3 para. 7 Directive 2009/72/EC represents also a sector-specific consumer protection provision of central importance.

Final energy prices for consumers may continue rising in the coming years with a negative impact particularly on consumers in an economically weak situation; therefore, they should be adequately protected.³⁷³ Vulnerable and affected by energy poverty may be primarily household customers within the meaning of art. 2 no 10 Directive 2009/72/EC and thus consumers.

4.1.2.1 Protection concept, high level of consumer protection

It is striking, that art. 3 para. 7 Directive 2009/72/EC turns off to different types of customers as shown below.

³⁷²See the predecessor regulation in art. 3 para. 5 Directive 2003/54/EC, which was updated in art. 3 para. 7 Directive 2009/72/EC.

³⁷³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 11.

In relation to such measures to be taken by the Member States in art. 3 para. 7 s. 1 Directive 2009/72/EC is referred to final customers in the sense of art. 2 no 9 Directive 2009/72/EC and with regard to measures for the protection of certain customers under art. 3 para. 7 s. 1 Directive 2009/72/EC reference is made to vulnerable customers. According to art. 3 para. 7 s. 2 et seq. Directive 2009/72/EC each Member State defines the concept of vulnerable customers itself and thus ensures associated therewith, that rights and obligations with respect to this new group of customers are met. Here, it is at the discretion of the Member States to terminate under the concept of vulnerability also to recourse to energy poverty and the prohibition of exclusion of vulnerable customers from the energy supply in difficult situations.

According to art. 3 para. 7 s. 5 Directive 2009/72/EC Member States have to ensure a high level of consumer protection in particular with respect to transparency regarding contractual conditions, general information and dispute settlement mechanisms as after the previous Directive 2003/54/EC.³⁷⁴ The provision specifies the actions, that are to ensure by the Member States to achieve a high level of consumer protection; the Commission assumes a high level of consumer protection also in accordance with its proposals in the area of consumer protection by art. 114 para. 3 TFEU, which corresponds to the aforementioned high level of consumer protection as defined by art. 3 para. 7 s. 5 Directive 2009/72/EC. The European Union legislature clarifies therefore that the internal electricity market should allow a real choice and cause competitive prices and higher standards of service in particular all private and commercial consumers in the EU.³⁷⁵

As in part 2 under 3.4.1.2 indicated the Directive 2009/72/EC is therefore based on a wide notion of consumer, that refers teleological to the actual "use" of energy - according art. 2 no 9 Directive 2009/72/EC "purchase of energy for own use". Consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market.³⁷⁶ Art. 3 para. 7 s. 5 Directive 2009/72/EC therefore obliges the Member States as defined above to ensure a high level of consumer protection in relation to all vulnerable customers.

According to art. 3 para. 7 s. 4 Directive 2009/72/EC precautions have to be taken to protect final

³⁷⁴See art. 3 para. 5 s. 3 Directive 2003/54/EC.

³⁷⁵Directive 2009/72/EC – recital (1).

³⁷⁶Directive 2009/72/EC – recital (51).

customers in remote areas. Here, it is questionable whether the European Union legislature turns off on all end users in the context of this broad definition or the term is teleological to reduce only to retail customers, that are to be defined as vulnerable customers by Member States. For the purposes of the intended protective purpose of the regulation the term is interpreted broadly insofar as all final customers in remote areas within the meaning of the above mentioned wide definition are worthy of protection and therefore have to be considered by the Member States under their protection concept necessarily in this respect.

The Member States have according art. 3 para. 7 s. 6 Directive 2009/72/EC to ensure that eligible customers are actually able to switch easily to a new supplier. Eligible customers are customers within the meaning of art. 2 no 12 Directive 2009/72/EC, so customers who are free under art. 33 Directive 2009/72/EC to purchase electricity from the supplier of their choice. Under art. 33 para. 1 lit. c) Directive 2009/72/EC these are since 1 July 2007 basically all customers under the condition that in cross-border electricity trades the respective customer is considered as eligible customer in the networks of the two affected Member States, so that the internal electricity market is open to all customers. The provision corresponds to the regulation in the previous Directive 2003/54/EC.³⁷⁷

Finally, art. 3 para. 7 s. 7 Directive 2009/72/EC refers to domestic consumers within the meaning of art. 2 no 10 Directive 2009/72/EC concerning the compliance with certain customer protection related measures, that are listed in Annex I Directive 2009/72/EC and which have to be ensured by each Member State. The provision corresponds to the regulation in the Directive 2003/54/EC.³⁷⁸ Annex I Directive 2009/72/EC specifies the measures described in art. 3 para. 7 Directive 2009/72/EC. Its implementation according art. 3 para. 7 Directive 2009/72/EC is partly in the discretion of the Member States as previously explained. So the European Union legislature already provides with Annex I Directive 2009/72/EC the framework of a possible concept of individual measures of vulnerable customers, that has to be completed by the Member States.

According to the target group art. 3 para. 7 Directive 2009/72/EC is beyond the universal service of art. 3 para. 3 Directive 2009/72/EC; this basically refers to household customers within the meaning of art. 2 no 10 Directive 2009/72/EC, i.e. on the bare electricity self-consumption outside of the

³⁷⁷See art. 3 para. 5 s. 4 Directive 2003/54/EC.

³⁷⁸See art. 3 para. 5 s. 5 Directive 2003/54/EC.

commercial and professional activities, and thus only to a partial area within the preamble of "end users as vulnerable customers" in the above sense. Even in the case of an extension of the scope of art. 3 para. 3 Directive 2009/72/EC on small businesses, which would be optional allowed to Member States, this would also in turn only comprise a small section of the so-called SME namely certain industrial customers and end users under art. 2 no 9 Directive 2009/72/EC, so would not cover in particular the larger end users, whose number of employees and annual turnover or annual balance sheet value as small businesses exceed those of a small company of an SME.³⁷⁹

The usefulness of the distinction in relation to the target group of universal service has to be clarified again after the following detailed presentation of art. 3 para. 7 Directive 2009/72/EC in the light of an overall consideration under aspects of consumer protection.

4.1.2.2 Protection of customers, art. 3 para. 7, para. 8 Directive 2009/72/EC

Compared to the previous provision³⁸⁰ art. 3 para. 7 Directive 2009/72/EC has been extended. Now each Member State has to define according art. 3 para. 7 s. 2 Directive 2009/72/EC the concept of vulnerable customers. In addition, according art. 3 para. 7 s. 3 Directive 2009/72/EC the compliance with the rights and obligations in connection with such vulnerable customers must be guaranteed by the Member States. This applies under art. 3 para. 7 s. 4 Directive 2009/72/EC on measures to be taken by the Member States regarding the protection of customers in remote areas. Thus, there is in addition to the recent extension of art. 3 para. 7 Directive 2009/72/EC a national obligation for an implementation now. Until now, it was at the discretion of the Member States to take measures to protect customers in remote areas.³⁸¹

4.1.2.2.1 Consumer protection and energy efficiency

According to art. 3 para. 7 s. 1 Directive 2009/72/EC Member States have to take suitable measures

³⁷⁹See footnote 167.

³⁸⁰See art. 3 para. 5 Directive 2003/54/EC.

³⁸¹See art. 3 para. 5 s. 2 Directive 2003/54/EC – hereinafter Member States „may“ take measures to protect final customers.

of consumer protection with respect to final customers, so customers within the meaning of art. 2 no 9 Directive 2009/72/EC purchasing electricity for their own use and have to ensure that there is an adequate protection for such vulnerable customers. In this case, this includes consumers according to the broad definition of the term consumer, which is basis of the Directive 2009/72/EC.

The decision, as to which a customer protection-related measure within the meaning of art. 3 para. 7 Directive 2009/72/EC is suitable and which protection to protect vulnerable customers is considered reasonable, is - as before³⁸² - at the discretion of each Member State. By this provision the European Union legislature intends also and especially the fight against energy poverty in the internal electricity market, which is recognized as a growing problem in the European Union.³⁸³

In the opinion of the Union a more targeted protection of vulnerable customers by the Member States should take place in order to address their economic vulnerability and to help them make informed choices in the increasingly complex retail markets.³⁸⁴ Final customers should not be excluded from security of supply despite non-payment of an invoice under the condition that they are vulnerable in terms of this provision, but rather continue to have a legal claim of energy supply. Which group of people falls under this concept of energy poverty i.e. in the sense of the provision is in need of protection, however, is not regulated at EU level.³⁸⁵ The definition of this group of people should remain reserved for the Member States.³⁸⁶ Therefore, Member States should adopt and publish a definition of vulnerable consumers to be applied. According to the Commission need to ensure appropriate protection from unjustified disconnection of, inter alia, the elderly, unemployed and handicapped people.³⁸⁷

In the newly introduced art. 3 para. 8 Directive 2009/72/EC of the European Union the legislature

³⁸²See art. 3 para. 5 s. 1 Directive 2003/54/EC.

³⁸³Directive 2009/72/EC – recital (53).

³⁸⁴Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 11.

³⁸⁵Schlack, in EnZW 1/2013, p. 27.

³⁸⁶Communication from the Commission - Towards a European Charter on the Rights of Energy Consumers, COM(2007) 386 final, p. 16.

³⁸⁷Communication from the Commission to the European Parliament and the Council – completing the internal energy market, COM(2001) 125 final, p. 40.

has listed options, that might be considered by the Member States regarding the protection of customers in terms of maintaining security of supply and thus combat energy poverty. For this purpose, it is pointed out in art. 3 para. 8 Directive 2009/72/EC that the specific measures to protect customers vary taking into account the local conditions and thereby also taking into consideration socio-political measures or measures to improve energy efficiency for housing.³⁸⁸ Accordingly under art. 3 para. 5 lit. b) Directive 2009/72/EC is to provide for the first time that customers receive all relevant consumption data without discrimination.

This new scheme is taken to be seen in the context of energy efficiency. Thus, clients have the ability due to the disclosure of their consumption data to adapt their own behaviour or to increase the energy efficiency of residential buildings in order to reduce their energy costs purposefully. This revision in turn corresponds to the aforementioned provision of art. 3 para. 8 Directive 2009/72/EC, where recently pointed on the possibility of granting state subsidies for energy efficiency improvements also in the context of the combat against energy poverty. Depending on the concrete measures to combat energy poverty it may create a conflict in relation to the objective of improving energy efficiency. In particular the granting of subsidies to customers of energy poverty risks bears the danger that this customer-related incentives for energy efficient behaviours would be rather reduced and that such an approach would behave in principle counter-productive to the improvement of energy efficiency; therefore, energy-saving measures as a cost-effective form of support and thus compared to purely financial help of vulnerable consumers should be taken into consideration as sustainable measures as a priority while financial support may nevertheless be considered solely in terms of a purely socio-political action.³⁸⁹

According to art. 3 para. 8 s. 2 in conjunction with para. 15 Directive 2009/72/EC Member States are obliged to inform the Commission relating to the implementation of the consumer protection and the provision of universal services, which also - as previously explained - represents a social policy measure. The evaluation carried out by the Commission of such Member State briefings based on the calendar year 2011 already shows that the actual implementation of the concept of vulnerable customers within the Member States happened extremely different. In some Member

³⁸⁸Directive 2009/72/EC – recitals (45), (53).

³⁸⁹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 11.

States such as Denmark, Germany and Malta vulnerable customers are not defined as the matter in the above sense is assigned to the social legislation of the Member States and therefore not considered as an energy-specific issue; in other Member States an energy-specific protection of vulnerable customers is carried out partly, in which the definition, if existent, as well as the way of protection vary considerably.³⁹⁰

The Commission clarifies that energy and social policies can work together to protect vulnerable customers although it is not the intention to replace the social policy in relation to the protection of vulnerable customers through the energy policy.³⁹¹ Therefore, it is likely to be doubted, however, in the light of the aforementioned deficits in Directive 2009/72/EC as well as the socio-political differences and the existing economic gap between Member States related to the energy sector whether it is sufficient - as the Commission thinks - that "vulnerable groups are best protected from energy poverty through a full implementation by Member States of the existing EU energy legislation and use of innovative energy efficiency solutions".³⁹²

4.1.2.2.2 Consumer protection - social policy

According to the EU Treaties emanating from a tight correlation between economic and social policy after art. 3 para. 3 subpara. 1 s. 2 TEU economic and social progress should be secured after para. 9 of the preamble in the TEU; with the Treaty of Lisbon revised art. 3 para. 3 subpara. 1 s. 2 TEU qualifies the European market economy for the first time as socially.³⁹³ In art. 3 para. 3 subpara. 2 TEU, inter alia, reference is made to the to be examined combating social exclusion and promoting of social protection.

³⁹⁰Commission Staff Working Document – Energy Markets in the European Union in 2011, Part II, SWD(2012) 368 final, p. 54 et seq., where the progress also subject to vulnerable customers is shown in relation to each Member State.

³⁹¹Commission Staff Working Document - Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas retail markets, 22/1/2010, p. 6.

³⁹²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion, COM(2010) 758 final, p. 11.

³⁹³Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 495 para. 2.

In order to achieve this primary objective needy consumers should be granted the legal protection, that is required to counteract against the admission of energy poverty preventively. One option recommended by the European Economic and Social Committee is to adopt a common general definition of "energy poverty", that can be adopted by each Member State; a definition of this term - the aforementioned committee is proposing - could be found on the “difficulty or impossibility of customers to keep their home adequately heated at an affordable price and having access to other energy related services such as lighting, transport or electricity for use of internet and other devices at a reasonable price”.³⁹⁴

Although the EU takes care of the increasingly worsening problem of required customer protection to combat the already existing EU-wide energy poverty this is nevertheless expected to increase considerably in importance due to rising energy prices. The EU options, however, in relation to the Member States as a shared competence under art. 4 para. 1 lit. b) TFEU are limited to a mere support of the socio-political cooperation between Member States in terms of coordination and monitoring by art. 153, 151 TFEU as defined according to the principle of subsidiarity within the meaning of art. 5 para. 1 s. 2, para. 3 TEU. With respect to the definition and implementation of social policy the Member States perceive essentially their competence effectively. At its core social policy is a national matter.³⁹⁵ Accordingly, the Union supports and complements the activities of the Member States in relation to the fight against social exclusion pursuant to art. 153 para. 1 lit. j) TFEU in the sense of a mere coordinating competence.³⁹⁶ According art. 5 para. 3 TFEU the Union may take initiatives to ensure the coordination of the social policies of the Member States. Also in the area of energy law the Union should contribute by the cross-sectional clause of art. 9 TFEU in its efforts for ensuring an adequate social protection as well as for the fight against social exclusion.

The Union should take initiatives in connection with the avoidance of the aforementioned exclusion and thus to achieve this in art. 34 para. 3 CFR intended protective purpose under art. 153 para. 2 lit. a) TFEU excluding any harmonization of the legislation of the Member States in support of a preventive protection of the customers, i.e. consumers from increased social exclusion and concomitant energy poverty by encouraging and simplifying, for example, the cooperation between

³⁹⁴Opinion of the European Economic and Social Committee on “Energy poverty in the context of liberalization and the economic crisis“ (exploratory opinion), OJEC C 44/09, 11/2/2011, p. 54.

³⁹⁵Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 504 para. 26.

³⁹⁶Rebhahn/Reiner, in Schwarze, EU-Kommentar, art. 137 EGV para. 4.

the Member States by coordinating policies and guidelines. This form of an open coordination through initiatives of the Union under art. 5 para. 3 TFEU in the area of social policy represents a form of cooperation between Member States in order to achieve greater convergence of Member States' policies in the common interest of the EU; as instruments for this purpose are of help the agreement of common targets in the European Council or Council regularly on a proposal from the Commission the exchange of best practices between Member States, agreement between the Member States in the European Council or the Council on indicators, statistical methods or benchmarks for comparison of good practices, national action plans or reports as well as regular evaluation and review of progresses in the Council with the aim of learning from each other ("peer viewing").³⁹⁷ Accordingly, the establishment of a European platform against poverty and social exclusion has been proposed, which, among other things, aims at creating a joint commitment among the Member States and EU institutions fight poverty and social exclusion; it is stated in this context that energy poverty is also a sign of severe deprivation, which involves the risk that households can no longer heat and cool, but are also excluded from hot water, electricity and other essential domestic necessities.³⁹⁸

4.1.2.3 Addressees, art. 3 para. 3 and para. 7 Directive 2009/72/EC - coherence

A distinction with respect to the affected target group namely on the one hand in household customers or optional in small enterprises under art. 3 para. 3 Directive 2009/72/EC and on the other hand in vulnerable customers by art. 3 para. 7 Directive 2009/72/EC undermines the objective of achieving a high level of protection; the differentiation should be repealed by preparing a coherence between the two provisions of Directive 2009/72/EC relative to the addressees.

Already on grounds of competence the obligation to fulfill the universal service should be mandatory extended to the customer area, which is also covered from the scope of art. 3 para. 7

³⁹⁷Borchardt, Die rechtlichen Grundlagen der Europäischen Union, p. 228 para. 489.

³⁹⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion, COM(2010) 758 final, p. 2, 5, 27, where reference is made on footnote 11: Hereinafter people are considered “materially deprived“, if they experience at least 4 out of 9 deprivations: people cannot afford i) to pay their rent or utility bills, ii) keep their home adequately warm, iii) face unexpected expenses, iv) eat meat, fish, or a protein equivalent every second day, v) a week of holiday away from home once a year, vi) a car, vii) a washing machine, viii) a colour tv, or ix) a telephone.

Directive 2009/72/EC according vulnerable customers and energy poverty, whereby this is to limit on household customers including SME. As proven household customers and SME behave more passively than large industrial customers, which affects disadvantageous for these two customer groups; e.g. due to this passivity possible price differentials of an energy supplier or different energy suppliers remain unexploited.³⁹⁹

According to the fixing of the Member State guarantee of universal services the Union may rely on the internal market competence by art. 114 TFEU, the conditions were already presented in part 2 under 3.5.2.1. Ensuring a level playing field justifies an alignment; a EU wide approach is required for the purpose of establishing minimum standards, that need to be implemented mandatory by the Member States. Only at EU level a necessary approximation of legislation of various national provisions, that would lead to distortions of competition without such an approximation, can be carried out.⁴⁰⁰ The competence of the Union is therefore to regulate the universal service obligation even to eliminate possible distortions and over and above to provide such restrictions, that are necessary for reasons of public interests.⁴⁰¹ Even under subsidiarity and proportionality perspective the Union is pursuant to the execution of alignment by art. 114 TFEU entitled as the investigation under part 2 under 3.5.2.2 has been already shown.

The obligation to fulfill universal service aimed on a Member State consumer protection-related minimum standard in the context of the approximation of competition conditions, that was not yet in place before the adoption of Directive 2009/72/EC.⁴⁰² This aims to contribute to improving the conditions relating to the establishment of the internal electricity market and its functioning. In case of extension of the universal service obligation to "affordable price" required at least on SME as a whole not just on the small business segment within SME, for which the Union would be entitled for competence point of view, a high level of consumer protection regarding the obligation to ensure

³⁹⁹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 9.

⁴⁰⁰Linder, *Daseinsvorsorge in der Verfassungsordnung der Europäischen Union – Primärrechtliche Grundzüge eines Rechts der Dienste vom allgemeinen wirtschaftlichen Interesse*, p. 208.

⁴⁰¹Möstl, in *EuR* 2002, p. 318.

⁴⁰²Directive 2009/72/EC – recital (50), according to which the minimum standards need to be strengthened to ensure the universal service, so before the adoption of the Directive 2009/72/EC there were still no sufficient minimum standards.

security of supply would be given. By creating a consistency in relation to the target group between the two schemes, i.e. art. 3 para. 3 and para. 7 Directive 2009/72/EC the group of vulnerable customers would uniformly defined on the other hand and thus a minimum harmonization regarding the two rules, between which a close factual relation exists, can be brought about at Member State level.

The universal service under art. 3 para. 3 Directive 2009/72/EC would be equally to implement as a key protective element also within the meaning of art. 3 para. 7 Directive 2009/72/EC in relation to an identical range of addressees of all Member States; thus in all cases adequate energy supply to vulnerable customers would be guaranteed, in which with respect to the offer and therefore the conditions, i.e. in terms on the "how", a differentiation between the customer groups so, for example, in relation to domestic consumers and SME would be possible.⁴⁰³ In addition, for vulnerable customers of this target group further measures in accordance with Art. 3 para. 7 Directive 2009/72/EC could be carried out by the Member States, if necessary. These measures, which are at the discretion of the Member States and depend on the specific conditions of each Member State, could permissibly vary within the individual Member States, that include specific measures for the payment of electricity bills or general measures within the national social security systems.⁴⁰⁴

4.1.2.4 Universal service obligation according to network operation voltage level

Against the background that the Member State exercise of discretion in terms on the voluntary inclusion of small businesses in the universal service obligation is likely to be different and also concerning the definition of the concept of household customers is unclear whether the national legislature will adapt the definition of the EU legislator in art. 2 no 10 Directive 2009/72/EC is offered itself as a more practical option to refer to the network operation voltage level regarding the obligation to ensure the universal service. This could be done by Member State obligation of implementation in relation to all customers connected at low-voltage with respect to a mandatory right to universal service, which would be purported in a subsequent Directive by the European Union legislature. At the low-voltage grid household customers and beyond basically smaller

⁴⁰³Directive 2009/72/EC – recital (44).

⁴⁰⁴Directive 2009/72/EC – recital (45).

industrial and commercial businesses across Europe are connected. For the benefit of the Member States the option could be given to extend its universal service obligation under a protective reinforcement on such in the medium-voltage level connected customers; thus it would be possible for the Member States to differentiate in terms of the obligation for the guarantee of universal services among different customer groups, i.e. in particular between different groups within the SME.⁴⁰⁵ So, it would remain to each Member State to take into account accordingly special features and differences in relation to other Member States in the context of the concrete form of the respective conditions.

This approach would cause an admissible minimum harmonization at Union level in relation to those customers, which have a claim to universal services. In addition, it would be as before at the discretion of the Member States to strengthen consumer protection by optional inclusion of other customer groups, that are, for example, connected in the medium-voltage level such as large industrial customers.

4.1.3 Interim conclusion

With the now established clarifying obligation to carry out the universal service obligation in relation to household customers and as a Member State option also for small companies the overall security of supply is expanded as an economic objective for a social policy approach in terms of a customer-specific safety of basic supply and thus an individualized security of supply. For household customers as consumers, who are primarily to protect, the security is given at any time to return to the basic supplier in participation in the competition through a change of the supplier. This for consumers existing "fall-back-option" provides the necessary security and confidence to participate in the electricity market and thus taking an active role.

In contrast to the previous Directive 2003/54/EC the scope of the protection area continued to improve especially for the benefit of household customers, who are consumers in the sense of Directive 2009/72/EC, but in addition also for the benefit of final customers, who are considered as consumers in certain situations equally. Furthermore, art. 3 para. 3 and para. 7 of Directive 2009/72/EC where in terms of the content further substantiated by mandatory provisions to be

⁴⁰⁵See footnote 379.

implemented, which should contribute to further harmonization at national level in the interest of consumers.

Nevertheless, there are still subsequent regulation deficits as well as limits of competence for the EU legislator.

The connection obligation is no universal service specific obligation regarding the household customer area or the area of small businesses. It is in this respect a general duty of the responsible network operator, which he has to implement basically with regard to all customers as connectee.⁴⁰⁶ The provision of art. 3 para. 3 s. 3 Directive 2009/72/EC referring to the obligation of connecting customers should be integrated for reasons of legal clarity as well as systematic reasons as a public service obligation in art. 3 para. 2 Directive 2009/72/EC and should be added for clarification purposes to the network access duty as an additional public service obligation.

The guarantee of universal services is an obligation, which was given according to the concept of universal service in the telecommunications sector. Equally as in this sector the right of household customers to a universal service at an "affordable" instead of a "reasonable" price should be laid down also in the electricity sector. For, a differentiation between these two sectors there are no reasons apparent; rather speak of such an approach are the recent disproportionately increased or probably further increasing energy costs, that burden especially household customers and thus require a preventive consumer protection approach, that should start already in universal services considering the height of the price requesting in this case to avoid energy poverty.

Also the distinction of addressees in art. 3 para. 3 Directive 2009/72/EC compared to art. 3 para. 7 Directive 2009/72/EC should be repealed. A coherence in this regard should be done insofar as both provisions protect same addressees according to the target group of art. 3 para. 7 Directive 2009/72/EC, that is associated with the fundamental universal service obligation. Due to the existing EU internal market competence under art. 114 TFEU in relation to the establishment of an universal service obligation the Union would have the opportunity for achieving consistency in Directive 2009/72/EC at Member State level to obtain a minimum harmonization insofar as, for example, a right of universal service consists to all customers connected to low-voltage level;

⁴⁰⁶Exceptions are possible within narrow limits in the event of economic or technical unacceptability of the preparation of the connection by the network operator, which should not be further considered.

therefore, it could be at the discretion of the Member States to extend their universal service duty within the framework of the strengthening of the protection referring to customers connected in the medium-voltage level. In the case of an assignment to the customers connected to the low-voltage level it would be related to residential customers as well as partially to SME customers.

A major challenge will be in the future to achieve the highest possible level of consumer protection in relation to improving the protection of vulnerable customers to curb a growing energy poverty at EU level. Despite the goal of an European social policy the competence of the Union is very limited in the sense of a mere coordination. However, the Union is encouraged to develop in accordance with a priority Member States' competence and a concomitant consideration of national specificities and differences guidelines together with the Member States. It will be a continuous dialogue between the Union and the Member States concerning the internal electricity market to achieve a fruitful interaction between economic and social policy without distortions of competition and to open also vulnerable customers through supportive social policies the opportunity to participate in the competition and to promote this. The fact of the protection of some consumers does not argue against a continuation of the path of liberalization; but rather the adequate protection of consumers particularly those in vulnerable situations will be a key criterion for successful completion of the EU internal energy market.⁴⁰⁷

4.2 Measures for customer protection, Annex I Directive 2009/72/EC

Consumer welfare is at the heart of well-functioning markets; empowered consumers need real choices, accurate informations, market transparency and the confidence, that comes from effective protection and solid rights.⁴⁰⁸ Consumers, whose needs are in the focus of Directive 2009/72/EC, should be concerning their rights, which should be aimed at greater transparency, strengthened and safeguarded; therefore consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market.⁴⁰⁹ Since the state monopolies were replaced by

⁴⁰⁷Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Making the internal energy market work, COM(2012) 663 final, p. 11.

⁴⁰⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Consumer Policy Strategy 2007-2013, COM(2007) 99 final, p. 5 (see also footnote 161).

⁴⁰⁹Directive 2009/72/EC – recital (51).

mere private oligopolies in many Member States there is a need to step up measures to ensure transparency and competition in the energy sector.⁴¹⁰

Therefore, it is focused in the Directive 2009/72/EC to the already in part 2 presented so-called mature consumer, who uses his opportunities for market participation and thus contributes to the functioning of the market actively. Namely, because the European consumer model propagates a mature consumer acting prudently the law must consequently protect also the empowered and self-determined consumer decision by ensuring an unimpeded as well as effective flow of information.⁴¹¹

Hereinafter should be investigated, which consumer protection provisions are laid down in the Directive 2009/72/EC for the achievement of the objective of achieving transparency for the consumer to permit a change of supplier for his benefit easily and secured. Beyond, the question arises whether such consumer protection information requirements implemented in the Directive 2009/72/EC are suitable to give such informations to the consumer, that he needed for a self-determined decision, so if, in other words, the required transparency through informations presented to him continuously in an understandable and complete form is guaranteed.

4.2.1 Supplier change, transparency

As in the past⁴¹² Member States have to ensure according art. 3 para. 7 s. 6 Directive 2009/72/EC that the eligible customers as defined by art. 2 no 12 Directive 2009/72/EC can switch to a new supplier; now, it is newly introduced that this change must be easily possible. Consumers should be protected specially against anti-competitive actions of the previous supplier, so, for example, exclusivity clauses, which lead to the exclusion of complementary offers from other suppliers and

410Opinion of the European Economic and Social Committee on "Energy poverty in the context of liberalization and the economic crisis" (exploratory opinion), OJEC C 44/09, 11/2/2011, p. 55.

411Metz, in Verbraucherschützende Informationspflichten in der Werbung, p. 146; see also art. 2 lit. e), art. 7 para. 1, para. 2 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), OJEC L 149, 11/6/2005, p. 22 at p. 26, 28 et seq.

412See art. 3 para. 5 s. 4 Directive 2003/54/EC.

binding the consumer contractual against his will to the present supplier.⁴¹³

After the newly inserted art. 3 para. 5 s. 1 lit. a), s. 2 Directive 2009/72/EC Member States have to ensure that a change of supplier is to implement within a period of three weeks non-discriminatory. The implementation of this short period of change is fundamental for the acceptance and participation of consumers in the liberalized energy markets; consumers high willingness to change is the basis for further development of competition.⁴¹⁴

Also newly introduced is also art. 3 para. 4 s. 1 Directive 2009/72/EC, which requires Member States to ensure, that all customers should have the right to be supplied with electricity from a supplier of their choice within the Member States of the EU. To ensure this goal of cross-border supply Member States have to take all necessary measures under art. 3 para. 4 s. 2 Directive 2009/72/EC to prevent discrimination against the utilities. This provision emphasizes the reference to the internal market and clarifies within the meaning of art. 3 para. 7 s. 6 Directive 2009/72/EC that by the Member States a simple so also uncomplicated customer switching to a new supplier must be guaranteed even cross-borders. The Commission refers in this context to the need of securing common rules for a true internal market and consequently a broadly supply of electricity accessible to all as one of the main goals of the Directive.⁴¹⁵ Because so far obstacles for non-discriminatory sale of electricity within the Union to uniform conditions are still there due to existing discriminations of network access as well as a non-existent equally effective level of regulatory supervision.⁴¹⁶

With this in numerous passages of the Directive 2009/72/EC securitized cross-border approach concerning energy supply and the need to establish cross-border interconnections as a central precondition for the completion of the internal market competition should be promoted not only at Member State level but also throughout the whole internal market in electricity and thus provided consumers with all energy sources at the most competitive price within the Union.⁴¹⁷

⁴¹³Directive 2009/72/EC – recital (20).

⁴¹⁴Theobald, in Danner/Theobald, *Europäisches Energierecht*, Bd. 1 § 20 a p. 2.

⁴¹⁵Directive 2009/72/EC – recital (60).

⁴¹⁶See footnotes 105, 203, 298, 512.

⁴¹⁷Directive 2009/72/EC – recital (5); see also recitals (1), (8), (60), (63) concerning the approach of the Union to promote cross-border trade as well as the access including the setting up of cross-border interconnections; in recital

This internal market approach in relation to a Member State transnational supply coupled with the Member State commitment of ensuring a rapid change of the supplier in favour of the consumer is indispensable as the central right of consumer protection to promote competition. Whether this goal can be achieved, however, depends both on the future provision of the necessary network infrastructure on the one hand and also by the granting of a non-discriminatory access for the benefit of the network customers and notably for the benefit of the suppliers in the aforementioned sense on the other hand. Already from this example the factual connection between consumer protection and regulatory law and therefore the consumer protective effect of the regulation, which will be examined in this part 3 of the work under 4.4, becomes clear.

Likewise, this achievement of the objective due to the protection of consumers also depends on how the individual Member States legally implement the non-discriminatory exchange of the supplier, which is required to perform within three weeks. The determination of the individual measures in this regard is in the discretion of the Member States, which is restricted in two ways. On the one hand Member States have to ensure a high level of consumer protection particularly with respect to transparency regarding contractual terms but also in terms of general informations and dispute settlement procedures under art. 3 para. 7 s. 5 Directive 2009/72/EC. With respect to the transparency of the general conditions follows from Annex I para. 1 lit. a), c), d) Directive 2009/72/EC (formerly: Annex A lit. a), c), d) Directive 2003/54/EC) that the Member States, inter alia, need to adopt measures ensuring that these conditions are written fair and transparent as well as stated in clear and comprehensible language and are notified to consumers before the contract is concluded, and that consumers receive transparent informations on applicable prices as well as tariffs and on standard terms and conditions.⁴¹⁸ Due to the objective of ensuring a high level of consumer protection and the required purpose of the establishment of transparency intended with the provision the terms "conditions of contract" and "general informations" are basically interpreted widely in favour of the consumer. Therefore, there is much evidence to limit this requirement for transparency not only to the mere contract terms but beyond to extend this also to the contract system itself; for a lack of transparency already in terms of the contract system itself, i.e. for the

(63) reference is made to the adoption of guidelines for the preparation of the necessary harmonization measure based on the Electricity Trade Access Regulation (EC) No 714/2009 (see footnote 2); see also art. 6 para. 1 s. 2, art. 36 lit. c), art. 37 para. 1 lit. b), lit. c), para. 6 lit. c), art. 38 para. 2 lit. a), para. 4 Directive 2009/72/EC.

418ECJ C-92/11, RWE Vertrieb v. Verbraucherzentrale NRW e.V. (21/3/2013), para. 45 (not published yet).

consumer concluded contracts, may not be compensated by a mere transparency in terms of the contractual conditions.⁴¹⁹ Ideally, European comparable standardized conditions are formed including requirements on essential consumer protection-related information content in the sense of a "best practice" without overwhelming the consumer with unnecessary informations. The provision, which was adopted with the same wording from the previous Directive⁴²⁰, is to be considered especially in the context of a simple change of supplier and represents a clarification with respect to the minimum content of the contract to be determined within the meaning of all vulnerable customers in the sense of art. 3 para. 7 Directive 2009/72/EC.

On the other hand the discretion of the Member States is restricted to the extent that under art. 3 para. 7 s. 7 Directive 2009/72/EC at least for residential customers those in Annex I Directive 2009/72/EC listed measures, which are investigated below, are to ensure also within the framework of such a change of supplier. For, consumers are only active on the market if they can be sure that their rights are continue to be protected even if they switch to another supplier.⁴²¹ Also in this case from the wording of the provision that such guarantee with respect to the measures listed in Annex I Directive 2009/72/EC has "at least" to take place in the case of household customers as in the past⁴²² it is evident that thereby a protective reinforcement is open to Member States in terms of the inclusion of other groups of customers such as small businesses or SME overall in this protected area. Minimum harmonization is committed by the Union legislature only based on the household customer segment.

4.2.2 Individual measures

Following the individual measures of Annex I Directive 2009/72/EC as far as they relate to consumer protection and thus in Directive 2009/72/EC corresponding measures are explained. The presentation of these measures is carried out in separate paragraphs without making any differentiation in the form of additional bullet points and thus individual headings beyond.

⁴¹⁹Thiemann, in RdE 2006, p. 41 at p. 42.

⁴²⁰See art. 3 para. 5 s. 3 Directive 2003/54/EC.

⁴²¹Communication from the Commission towards a European Charter on the Right of Energy Consumers, COM(2007) 386 final, p. 3.

⁴²²See art. 3 para. 5 s. 5 Directive 2003/54/EC.

The Member State obligation to ensure the measures listed in the Directive 2009/72/EC Annex I represents another key consumer protection rule of Directive 2009/72/EC; this already shows the exemplary reference in Annex I of further consumer-specific Directives namely the Distance Selling Directive 97/7/EC⁴²³ and the Clause Directive 93/13/EEC⁴²⁴, which are also to be considered in the context of measures to protect customers. A representation of these two consumer-specific guidelines with respect to their impact on the energy sector-specific consumer protection is, however, not made.

The Commission considers that access to objective and transparent consumption data for consumers is a key aspect concerning the supply of customers so that they can invite competitors to make an offer based on those data.⁴²⁵ Accordingly, the current content of Annex A in the previous Directive 2003/54/EC⁴²⁶ is now inasmuch completed in Annex I Directive 2009/72/EC as a withdrawal from the contract as well as compensation and refund arrangements even in the case of inaccurate and delayed billing must be free of charge including the provision of clear informations on consumer rights also used for the treating of complaints and all in Annex I para. 1 lit. a) Directive 2009/72/EC listed informations as part of the invoice as well as on the website of the electricity company.⁴²⁷

The heading in Annex I Directive 2009/72/EC obliges the Member States to ensure measures to protect customers. It is questionable whether the European Union legislature referring to all

423See footnote 136.

424Unfair Terms Directive 93/13/EC was amended by Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EC and Directive 97/7/EC of the European Parliament and of the Council, OJEC L 304, 22/11/2011, p. 64 et seq.

425Directive 2009/72/EC – recital (50).

426In Directive 2003/54/EC Annex A listed informations, which were adopted in Directive 2009/72/EC Annex I on the one hand and which were supplemented (see “italics”) on the other hand, include: name and address of the supplier, provided service and service quality level offered as well as the time of the initial connection, the type of maintenance service offered, the means concerning up-to-date information on all applicable tariffs and maintenance charges, duration of the contract, conditions for renewal and termination of services and of the contract, and “*the question, whether withdrawal from the contract is permitted without charge*”, any compensation and the refund arrangements which apply, if contracted service quality levels are not met, “*including inaccurate and delayed billing*”, methods of initiating procedures for dispute settlement in accordance with lit. f), “*provision of clear information to consumer rights, including on the complaint handling and all of the information referred to this point, clearly communicated through billing or the electricity undertakings` web site*”.

427See the passages in italics in footnote 426.

customers within the meaning of art. 2 no 7 Directive 2009/72/EC so also to wholesalers in addition to final customers or exclusively to final customers or only to household customers. In favour of a reference to the final customers could speak the reference to art. 3 Directive 2009/72/EC as a whole; thereafter, the companies of the Member State imposed public service obligations are to be implemented for the benefit of all consumers, i.e. in the sense of the wide notion of consumer also in favour of the final customers. Likewise, the wording of art. 3 para. 7 s. 1 Directive 2009/72/EC, which also refers to final customers, could support this approach. Decisive here, however, is the reference in art. 3 para. 7 s. 7 Directive 2009/72/EC, after what the measures include the measures in the case of household customers listed in Annex I. The measures therefore relate to the household customers area and are tailored to this. Therefore, in Annex I it should be clarified that the customers are household customers. Would the protected target group determined by the voltage level as shown in this part 3 under 4.1.2.4 a reference to the customers connected to low-voltage in Annex I would be consistently.

It is still unclear whether the reference in Annex I para. 1 Directive 2009/72/EC to art. 3 Directive 2009/72/EC is an editorial oversight of the legislature insofar as art. 3 para. 7 s. 7 Directive 2009/72/EC refers on such measures, under which only measures within the meaning of art. 3 para. 7 could be meant. Against this narrow approach is already to speak that Annex I para. 1 lit. g) Directive 2009/72/EC in content related to measures such as on the access to universal services in the sense of art. 3 para. 3 Directive 2009/72/EC as well as on the handling of customer complaints in Annex I para. 1 lit. f), which go beyond the scope of art. 3 para. 7 Directive 2009/72/EC. It is therefore necessary to make within the meaning of consumer protection a comprehensive integration and application of Annex I in the scope of protection of art. 3 Directive 2009/72. Hence, Annex I refers to all the measures under art. 3 Directive 2009/72/EC, which are specified in Annex I for the purposes of consumer protection, with the objective to contribute to a higher level of harmonization on Member State level within the national obligation of transposition.

Art. 3 para. 7 s. 7 Directive 2009/72/EC should be therefore presented and specified in content also as a turning point to the preceding paragraphs including also para. 7 of art. 3 Directive 2009/72/EC in a separate for instance new para. 8 from law systematic reasons, so that at least in the case of household customers or to low-voltage connected customers “measures within the meaning of art. 3” include those in Annex I listed measures.

For the purposes of this result and thus the opening of the scope of Annex I to measures under art. 3 Directive 2009/72/EC on the whole the Union legislator refers in terms of the customer protection-related measures of Annex I consequently not only on the sales side but equally to the fulfillment of the public services within the meaning of art. 3 para. 2 Directive 2009/72/EC including universal services under art. 3 para. 3 Directive 2009/72/EC. That Annex I para. 1 Directive 2009/72/EC in addition also takes reference on the network side already opens up the wording of the provision, after what in Annex I para. 1 lit. a) s. 1 Directive 2009/72/EC reference is made to the provider of electricity services, i.e. a terminology is chosen, which includes in addition to the energy supplier also the network operator. This result is further underspinned by the reference of the European Union legislature elsewhere, namely, for example, in Annex I para. 1 lit. e) Directive 2009/72/EC exclusively to the supplier, thus opening up the sales-related scope to this provision.

It is striking, that the European Union legislature does not make a clear differentiation between the network and sales area for the measures listed in Annex I in detail; so, for example, in Annex I para. 1. lit a) slash 3 Directive 2009/72/EC listed maintenance services relate to the network connection side, i.e. obligate exclusively the network operator, who is responsible for the network connection; this applies equally to the reference in slash 4 concerning the maintenance charges and informations on tariffs; the term "tariffs" refers only to the network side.⁴²⁸ For reasons of legal clarity and legal certainty on the national implementation the EU legislature should differentiate in Directive 2009/72/EC Annex I in relation to the measures to be ensured by the Member States between the competition area, so the sales side, and the network area as the monopoly area and as such separate Annex I in Annex I lit. a) "distribution services" and Annex I lit. b) "network services". Furthermore, the term "electricity services" should not be used in relation to the network or sales area; rather a distinction should be made between "network services" and "distribution services" for reasons of legal clarity. Those other services relating to both of the aforementioned areas as "general services", however, should be preceded.

The provision of Annex I para. 1 lit. b) Directive 2009/72/EC, which affects both the distribution and the network side, aims to create transparency for the benefit of the customers while both energy supplier and network operator must ensure different information duties due to existing contractual

⁴²⁸Directive 2009/72/EC – recital (32), according to which transparent and non-discriminatory tariffs have to be provided for network access; see also art 32 para. 1 s. 1 Directive 2009/72/EC, according to which the Member States have to ensure a network access system based on published tariffs.

relationships to their customers such as changes of contractual terms, changes of fees and contract cancellation rights. Compared with the previous provision⁴²⁹ the service provider now has to inform its customers, among other things, about any fee increase in a transparent and understandable way. Furthermore, Member States must ensure that the customers have a contractual right of termination if they do not accept the new terms of the contract partner, to which they must be timely informed in advance. This is a special right of termination in favour of the consumer making use of in the event of changes in conditions. To exercise this it is for the supplier to inform the consumer not only about an upcoming increase of the fees and of his right to terminate the contract in advance, but to inform the consumer prior to conclusion of the contract clear and understandable about the basic conditions of the exercise of such a right for a unilateral variation of the contractual terms; a mere reference in the general terms and conditions on a rule of law, in which the rights and obligations of each party in this respect are laid down, is not sufficient to the requirements of the aforesaid notification obligation in favour of the consumer rather the occasion and mode of the fee change including the termination right by the contractor must be brought to the attention of the consumer.⁴³⁰

Also the transparency requirement serves the regulation of Annex I para. 1 lit. c) Directive 2009/72/EC, which corresponds to the wording of the preceding text of the Directive⁴³¹, according to which customers are to be informed in a transparent manner on applicable prices and tariffs as well as standard terms and conditions in respect of access to and use of electricity services. The provision, which contains a mere obligation to provide information by the energy service provider in favour of the consumer, refers to the existing contractual relationship and its standard conditions, i.e. the implementation of the existing contractual relationship without changes. In the event of a change in the conditions the more stringent information requirement by the energy service provider in favour of the consumer according to the above Annex I para. 1 lit. b) Directive 2009/72/EC is relevant. From the aforementioned differentiation between "prices" and "tariffs" the reference of this regulation is clear on both to the sales and the network side. The term "prices"⁴³² refers exclusively to the competition, so the sales side, while the term "tariffs"⁴³³ concerns the network side, i.e. the

429See Annex A lit. b) Directive 2003/54/EC.

430ECJ C-92/11, RWE Vertrieb v. Verbraucherzentrale NRW e.V. (21/3/2013), para. 50, 52 (not published yet).

431See Annex A lit. c) Directive 2003/54/EC.

432Directive 2009/72/EC – recital (8), according to which the supply of electricity to competitive prices has to be ensured.

433See footnote 428.

regulated monopoly.

According to Annex I para. 1 lit. d) s. 1 Directive 2009/72/EC customers are offered the option of different payment methods without undue discrimination. This by Directive 2009/72/EC in contrast to the previous Directive⁴³⁴ newly introduced supplement designed to prevent both discriminating customers⁴³⁵ against additional supplements in the choice of a particular method of payment and actually undermining the existing legal choice of the consumer between different payment methods.

Completely newly introduced compared to the previous text of the Directive⁴³⁶ is the term "prepayment systems" in Annex I para. 1 lit. d) s. 2 Directive 2009/72/EC, that must be fair and adequately reflect the likely consumption.⁴³⁷ The prepayment system returns the obligation to deliver the electricity by the supplier or to guarantee the network access by the network operator, which must always perform its service in advance in each case in that order as the customers are now required to perform in advance by a so-called prepayment. The return of the customer in the form of a prepayment, that is set to the amount of the basis of a specific electricity consumption period such as at least one month or more months, is already to be paid before the beginning of each month of the service provision and thus in advance. Supplier or network operator therefore obtained by the prepayment in the form of a cash in advance a security, that must be proportionate in particular appropriate in the interests of consumer protection, so that the consumer should not be unduly burdened. Otherwise, there is a risk that the consumer could not afford such unreasonably high prepayment and would thus be excluded from the electricity supply including the network access.

Although the European Union legislature merely indicates that the prepayment should adequately reflect the probable consumption it is open, to what time frame this request of the European Union legislature refers.⁴³⁸ A prepayment is likely to be reasonable in any case regarding the amount, which is based on a monthly consumption; a prepayment, which is determined on the energy consumption

434See Annex A lit. d) s. 1 Directive 2003/54/EC.

435See also Directive 2009/72/EC – recital (50), where reference on consumers is made.

436See Annex A lit. d) Directive 2003/54/EC, which refers to payment systems hitherto and does not reference on prepayment systems.

437See Directive 2009/72/EC – recital (50).

438Directive 2009/72/EC – recital (50): it is pointed out, that prepayments should reflect the likely consumption.

of several months, is likely, however, inappropriate and thus disproportionate, so be prohibited.

By the provision recently limited the right of the service provider regarding the reversal of performance and counter-performance in the form of a prepayment by barriers such as fairness and reasonableness the contract party of the consumer is obliged to comply with the principle of proportionality; thus the concretization represents a strengthening of consumer protection. Nevertheless, the Member States remain in the implementation of prepayment systems a significant degree of discretion. This concerns in particular besides the aforementioned assessment of the amount of the prepayment additional fundamental questions, namely under what conditions and at what moment a prepayment is to be charged and over what time period this prepayment, for example, despite fulfillment of all ongoing and originally outstanding debts by in accordance with the contract acting customer is mandatory to repeal by the network operator or supplier, so that it can not be further claimed.

A grammatical interpretation of the term "prepayment systems", namely the use of the plural and the reference to "systems" indicates that the European Union legislature does not only relate on the classic advance in the form of "payment in advance" as a possible system, but equally turns off on a "bailout", for example, in the form of a cash deposit or bank guarantee as another possible prepayment system. The term should be interpreted broadly. The national provision of such a security as a measure within the meaning of Annex I para. 1 lit. d) s. 2 Directive 2009/72/EC would therefore be covered by the wording of the Directive and thus admissible. However, it is here to be observed by the Member States that both prepayment and security as another possible "prepayment systems" are to be implemented without discrimination. With respect to the existing Member State discretion in relation to the fundamentally permissible charging of a deposit the previous remarks on the prepayment apply equally here.

To address the risk of a breach of fairness and reasonableness and thus against the principle of proportionality in the imposition of a prepayment or security the competent regulatory authority is according art. 37 para. 1 lit. j) Directive 2009/72/EC responsible for the task to observe the prepayment systems and their implementation towards customers and to inform the competition authorities for abnormalities. Here also the legislature is limited to an ex-post control primarily by the regulatory authority. Through unique Directive requirements concerning the basic conditions in relation to an application of the prepayment systems the amount of a prepayment or security deposit

as well as the duration in the case of a behaviour, which is in compliance with the contract, the consumer protection could be better guaranteed already preventively, i.e. ex-ante and thus the prohibition of arbitrariness in the context of the application of prepayment systems could be addressed in advance quite sure.

In terms of the general contract conditions according Annex I para. 1 lit. d) Directive 2009/72/EC the reference takes place as in the previous Directive⁴³⁹ that these prerequisites must be written in a fair and transparent as well as in a clear and understandable manner. New in turn is the insertion, after which no non-contractual barriers so, for example, an excessive number of contract documents may be included, that hinder customers from exercising their rights. This new addition aims to protect consumers from a flood of informations, that could overwhelm them and thus would rather hinder their active participation in the competition but promote. Under Annex I para. 1 lit. d) Directive 2009/72/EC is - as in the previous Directive⁴⁴⁰ - finally pointed to the mandatory protection against unfair or misleading selling methods.

Annex I para.1 lit. e) Directive 2009/72/EC regulates as previously⁴⁴¹ that a change of supplier is to ensure without charge; it should be prevented therefore a prohibitive effect to the detriment of the consumer caused by a charging.

Pursuant to Annex I para. 1 lit. j) Directive 2009/72/EC, which was newly introduced in the Directive, is to ensure that the customer must receive a final invoice no later than six weeks after a change of supplier. The purpose of the newly added consumer protection regulation is to give customers quickly clarity about possible liabilities or existing claims. The creation of transparency within a certain contractually specified time frame strengthens consumer confidence in the market.

In Annex I para. 1 lit. f) Directive 2009/72/EC regulated security of customer rights with respect to the treatment of complaints as well as the out-of-court dispute settlement is examined separately in this part 3 under 4.3.

439See Annex A lit. d) s. 2 et seq. Directive 2003/54/EC.

440See Annex A lit. d) s. 5 Directive 2003/54/EC.

441See Annex A lit. e) Directive 2003/54/EC.

As in the previous Directive⁴⁴² it is equally to ensure by Annex I para. 1 lit. g) Directive 2009/72/EC that customers are informed of their rights in relation to the universal service. Thus, the required transparency is also provided with regard to the universal service obligation for consumers stipulated in art. 3 para. 3 Directive 2009/72/EC. Due to the more expensive universal service⁴⁴³ it is of great interest for the consumer to be informed regularly about the universal service price to compare this with prices of other energy supply products of the supplier, who takes over the role of the universal service provider, or to compare this with prices of other suppliers with the option to switch to a new supplier.

Completely newly introduced was the securing for the benefit of customers according Annex I para. 1 lit. h) Directive 2009/72/EC to get their consumption data and to provide access to the consumption data without charging additional costs to the consumers. This rule specifies as a customer protection-related measure in relation to the household customer segment the general provision of art. 3 para. 5 lit. b) Directive 2009/72/EC, according to which all customers are entitled to receive the relevant consumption data free of charge. The burden of additional costs would have an prohibitive impact to the detriment of consumers therefore hinder their participation in the competition, which requires an uncomplicated access at any time and free of charge to customer-related consumption data.

Because to invite competitors to be able to submit a competitive offer based on a customer-related data base customers also need access to their consumption data in an objective and transparent manner.⁴⁴⁴ With the aforementioned newly introduced provision and thus ensuring the transparency it is possible for the consumer to match the supply conditions of different electricity suppliers and to evaluate them by comparing, for example, informations on the internet available portals. Furthermore, potential third party suppliers are in the position to submit an offer to the customer, which is objective comparable to the existing supply conditions. The new regulation serves competition and thus the consumer. It should in particular be equally in the interest of such electricity suppliers especially align their offers to the market conditions in particular on market prices to establish themselves in the electricity market and to gain new market shares.

⁴⁴²See Annex A lit. g) s. 1 Directive 2003/54/EC.

⁴⁴³See footnote 323.

⁴⁴⁴Directive 2009/72/EC – recital (50).

Also newly introduced was the provision in Annex I para.1 lit. i) Directive 2009/72/EC, after which it is to make sure, that customers are properly and often enough informed about their actual electricity consumption and electricity costs without charging additional costs therefore. Thus customers should be in a position to make informed decisions regarding their own energy consumption and to regulate this without being burdened with additional costs. The regulatory content has to be considered with respect to the improvement of energy efficiency and in the context of the therefore implemented Energy Efficiency Directive⁴⁴⁵; the energy efficiency must be considered in turn in the context of energy poverty insofar as energy efficiency measures lowering the energy consumption and thereby the energy costs and thus contributing partially to combat energy poverty.

Alike, as the customers themselves also energy companies are obliged under the newly introduced art. 3 para.11 Directive 2009/72/EC to optimize their energy consumption in particular by the provision of energy management services and the introduction of new pricing models or possibly smart metering systems or smart grids. Both of consumer protection reasons as well as environmental reasons the improvement of the energy efficiency makes sense; however, just the regular information to the customers about their electricity consumption does not contribute to increasing energy efficiency. Here, the key will be whether and how the concrete measures, which aimed to improve efficiency, will be implemented by the Member States, which costs and tangible benefits customers have and how the customers can be encouraged to exploit these measures in individual cases in spite of any financial burdens to their own advantages.

Furthermore, Annex I para. 2 Directive 2009/72/EC was newly codified. The background of this provision is the introduction of so-called “smart metering systems” intended to support the active participation of the consumer concerning the electricity supply market. The introduction of these systems should take place on the basis of an economic evaluation in particular by carrying out a market- and consumer-related cost-benefit analysis and examining some types of metering-systems in terms of their economic viability on a planning target of ten years. In the case of a positive evaluation of such an introduction at least 80% of consumers should be equipped by 2020 with intelligent metering systems. In this respect, Member States have also a wide discretion; as, for

⁴⁴⁵Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/73/EEC, OJEC L 114, 27/2/2006, p. 64 et seq.

example, only in relation to consumers with a minimum consumption of electricity the introduction of these systems should be taken into account under the condition that only in this case the system implementation is economically reasonable and cost-effective.⁴⁴⁶ However, it remains to be seen whether such an introduction taking into account economic conditions can be represented without additionally burdening the consumer financially considerably and whether this participation to the competition of the consumer is inspired supplementary.

Another provision, namely art. 3 para. 9 Directive 2009/72/EC, which has also been updated in relation to the previous regime⁴⁴⁷, concerns the so-called current labelling requirements. The scheme, which is mandatory to implement into national law in relation to all final customers, should put them in the position to adjust their demand decision regarding the electricity supply on the basis of primary energy sources used by the respective suppliers and their impact on the environment. Here, the electricity supplier has to inform the final customers in an understandable way especially in the customer invoices or promotional materials. The focus of this provision is primarily the environmental protection and concerns the consumer protection only indirectly. By labelling requirements it should be generally possible for consumers also to contribute through their autonomous decisions to environmental protection. Due to the primary purpose of the regulation concerning the protection of the environment it will not be investigated further.

Finally, art. 3 para. 16 Directive 2009/72/EC newly specifies that the Commission created in consultation with the Member States and various other stakeholders a clear and concise “checklist of energy consumers” with practical informations regarding the rights of energy consumers. The Member States have to ensure that the checklist of the potential contractual partners of consumers, so the network operators and electricity suppliers, must be provided or must be made publicly available in collaboration with the regulatory authorities.

The background of this provision is a clear and comprehensible information to consumers about their rights in the energy sector.⁴⁴⁸ With transparency from different angles namely from the perspective of the network and the distribution side the consumer should be enable to take his

⁴⁴⁶Directive 2009/72/EC – recital (55).

⁴⁴⁷See art. 3 para. 6 Directive 2003/54/EC.

⁴⁴⁸Directive 2009/72/EC – recital (52).

secured rights to claim and to preserve quite safe. The question again is, who is covered by the term “energy consumer” used by the legislature. Among them may fall exclusively household customers provided that art. 3 para. 3 Directive 2009/72/EC would be used as a criterion. On the other hand it could also be opened the scope for all final customers to protect under art. 3 para. 7 s. 1 Directive 2009/72/EC basically.

This latter approach is to be given preference. This results from the comprehensive customer protection art. 3 Directive 2009/72/EC intended, but also from the above mentioned purpose of the norm. This is a basic rule with the protection of all consumers and thus promoting all final customers after the Directive underlying wide consumer term. Accordingly, the gradually since 1999 established internal electricity market should be of use for all private customers as well as businesses.⁴⁴⁹ Also in this respect the use of a consistent terminology would be useful either by defining the notion consumer in the sense of the Directive 2009/72/EC or by referencing to the term "final customer" directly as in art. 3 para. 7 s. 1 Directive 2009/72/EC.

4.2.3 Interim conclusion

Compared to Annex A of the predecessor Directive 2003/54/EC the subsequent Annex I of Directive 2009/72/EC has been considerably extended now in favour of consumer protection measures by taking entirely new measures and continuing with already existing measures. The degree of information density and transparency in regard of contractual terms as well as general informations like consumer-specific consumption data with the objective of strengthening the mature and more active consumer was extrapolated on the basis of existing experience as well as concretized now.

The level of consumer protection was reinforced in terms of key measures such as the implementation of a non-discriminatory change of supplier including also a cross-border change within a prescribed period of three weeks complied with the submission of a final invoice by setting mandatory deadlines. Furthermore, the ban was lifted due to additional cost burdens of consumers with respect to several provisions in Annex I Directive 2009/72/EC and their previous prohibitive effect.

⁴⁴⁹Directive 2009/72/EC – recital (1).

In a subsequent Directive the following deficits, which the investigation has revealed, are to eliminate:

For reasons of legal clarity the previously used term „customers“ should be replaced in Annex I Directive 2009/72/EC by the term „in low-voltage connected customers“ as addressees, which fall under the scope of Annex I. If this approach, which the investigation derived in part 3 under 4.1.2.4, cannot be accepted the previously used term „customers“ should be replaced leastways by „household-customers“. After Annex I sets off on art. 3 Directive 2009/72/EC and the whole listed measures art. 3 para. 7 s. 7 Directive 2009/72/EC should be taken from law systematic reasons in a separate paragraph, which at least in the case of low-voltage connected customers or household-customers „measures within the meaning of art. 3“ include such measures listed in Annex I Directive 2009/72/EC.

Furthermore, it should be differentiated in Annex I Directive 2009/72/EC between networks and distribution services as well as assigning the respective measures corresponding to these two segments. All other general energy services relating to both of these areas should be drawn on the clip.

Conceptually, those in Annex I para. 1 lit. d) s. 2 Directive 2009/72/EC described prepayment-systems must be specified at least in terms of their general requirements for the assertion of such a security as well as the methodology for determining the level of the security and should be connected with a note that among the prepayment also the bailout is to assume.

Despite of these shortcomings the European legislature has nevertheless set the course with the legal framework of Directive 2009/72/EC for strengthening the consumer protection and thus the elimination of existing barriers to competition, which would further improve the autonomy of consumers. Although this has to be implemented mandatory in relation to the consumer segment ”household-consumer“ by the Member States there is nevertheless a significant degree of discretion in favour of the Member States relating to the manner of the implementation. The Member States have therefore the possibility to take into account their characteristics like different economic, social and socio-political conditions while implementing the regulations of the Directive into national laws.

It will be important that it succeeds the Member States to encourage those companies such as electric suppliers and network operators, who are required to implement these guidelines, to ensure an unhindered and non-discriminatory flow of informations in a standard manner by law in favour of the consumers. It will be further important to specify the right level of information content, i.e. to equip the consumers with understandable and sufficient informations, that does not go beyond what is necessary and therefore does not overwhelm the consumers consideration in the context of making a decision. For, the ability of the mature consumer with an objective assessment is an expression of his personal responsibility and must therefore be protected on the one hand in its objectivity as a consequence of liberalization of competition and on the other hand due to the associated, largely unimpeded flow of information.⁴⁵⁰

Just regular on their rights and opportunities within a reasonable time frame adequately informed consumers will be able and willing to obtain comparison quotes about electricity supplies to compare them with each other and thus to promote the competition in the internal energy market through self-determined decisions. The extent, to which the amendment of art. 3 para. 16 Directive 2009/72/EC to create checklists, whose transfer to the consumers is to grant by the Member States, contribute to it, remains to be seen. In any case, this approach being promoted and supported at EU level makes sense from a consumer perspective. This should be another building block for improving consumer protection due to the standardization of consumer protection-related activities within the Member States.

Furthermore, a Member State cross-exchange of experiences between the relevant stakeholders including regulatory authorities, consumer organizations and electricity undertakings will be indispensable in terms of how the progression of the electricity market benefits consumers. Thus, the European Union legislator may be able by a regular reporting of the Commission to the European Parliament and the Council to extrapolate in a following Directive the given legal framework of the EU with the aim to further strengthen consumer rights.⁴⁵¹

⁴⁵⁰Metz, Verbraucherschützende Informationspflichten in der Werbung, p. 148.

⁴⁵¹Note: The options for this are illustrated in Directive 2009/72/EC in numerous places. Thus the regulatory authorities shall monitor the level and effectiveness of market opening and competition at retail level including switching rates, prices for household customers, prepayment systems including providing any relevant information (art. 37 para. 1 lit. j). The regulatory authorities helping to ensure with other authorities that the consumer protection measures including those in Annex I are effective and enforced (art. 37 para. 1 lit. n), where the Member States shall ensure that the regulatory authorities are granted the powers and so enabling them to carry out the duties (art. 37 para. 4). Under art. 11 ACER Regulation (EC) 713/2009 the agency shall observe in close cooperation with the Commission, the Member States and the competent national regulatory authorities and without prejudice to the

Whether in addition regular informations on client-related energy consumption data constitute sufficient incentives in relation to the use of energy efficiency measures initially depends in particular on the introduction of innovative energy services and other measures especially the introduction of smart metering systems. Whether they are accepted by customers in a particular case to effect their energy consumption behaviour will largely depend on the relationship between costs and benefits of the customer and depend also on their relief by funding opportunities where necessary.

4.3 Out-of-court dispute settlement - consumer protection

An out-of-court dispute settlement is of great importance for consumers also within the internal electricity market. By the Union legislature with the Directive 2009/72/EC intended approach to the promotion of cross-border activities in the internal electricity market⁴⁵² but also the promotion of domestic trade activities in favour of consumers and consequent conclusions of contracts are associated with the importance of ensuring an effective enforcement of consumer rights, which must be performed for consumers out of court as simple as possible, quickly and free of charge. This applies even more in cases, where the consumer is facing as a contractor the network operator as a monopolist. In contrast to the energy supplier, who is exposed to the competitive pressure and therefore is interested in a possible long-term contractual relationship with a contented consumer as its customer the network operator is due to its monopoly position rather neutral towards the consumer interests, so that the consumer under this constellation is interested at a safeguarding in terms of a prompt enforcing of his rights.

Before these in Directive 2009/72/EC securitized rules are examined in detail general principles will be presented firstly, that show the meaning and purpose as well as the need for an out-of-court dispute settlement.

powers of the competition authorities of the electricity and the gas sector, in particular the retail prices of electricity and natural gas and compliance with the consumer rights laid down in Directive 2009/72/EC and shall publish under art. 11 para. 2 ACER Regulation (EC) 713/2009 an annual report hereby. According art. 47 para. 1 Directive 2009/72/EC the Commission shall monitor and review the application of the Directive 2009/72/EC and submit an annual overall progress report to the European Parliament and the Council about the progress, in which, inter alia, the economic and social consequences of the market opening to customers are represented.

⁴⁵²See remarks under footnote 417.

4.3.1 General principles

Approximately 20 % of consumers are facing problems when buying goods and services in the single European market.⁴⁵³ Within the EU a high level of consumer protection is already achieved in the opinion of the Commission; nevertheless the confidence of consumers is impaired in the internal market because they are not convinced that for any problems related to the purchase of goods or services an efficient solution can be found, and thus it is difficult to help consumers assert their right.⁴⁵⁴ Therefore, consumers do not fully exploit their opportunities offered by the single market in terms of greater product selection or a more effective price and quality competition; because they are worried that potential problems in cross-border purchases are difficult to solve.⁴⁵⁵

Most consumer disputes adhering feature is from the perspective of the consumer the disproportion between the economic value at stake on the one hand and the expended costs of its judicial settlement on the other.⁴⁵⁶ Hence, consumers are afraid of the use of legal remedies, so resign regardless of the prospects of success on the judicial use to enforce their rights. Therefore, the consumer protection movement called for a long time vehemently the implementation of more effective enforcement of consumer rights as "access to the justice".⁴⁵⁷ In connection with this emphatic petitum the mechanism of out-of-court dispute settlement and consequently the concept of "alternative dispute resolution" was born.⁴⁵⁸ This includes extrajudicial processes such as arbitration or mediation, in which a neutral party outside the state courts provides a solution between the parties to the dispute.⁴⁵⁹

453Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), COM(2011) 793 final, p. 2, which refers under footnote 1 to the Eurobarometer 342 „Consumer Empowerment“ (p. 169).

454Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Alternative dispute resolution for consumer disputes in the Single Market, COM(2011) 791 final, p. 2.

455Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Alternative dispute resolution for consumer disputes in the Single Market, COM(2011) 791 final, p. 2 et seq.

456Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 31.

457Hess, in ZJP 118 (2005), p. 427 et seq.; Isermann/Berlin, in VuR 2/2012, p. 47.

458Also referred to as “ADR – alternative dispute settlement“.

459Alternative Dispute Resolution and Online Dispute Resolution for EU consumers – Questions and Answers, MEMO/11/840, 29/11/2011, p. 1.

Based on the energy sector, therefore in the Directive 2009/72/EC as previously in the Directive 2003/54/EC⁴⁶⁰ also a judicial dispute upstream mechanism in relation to the implementation of an alternative dispute resolution procedure was anchored, which in relation to the predecessor Directive has been updated as shown below. Basically, an out-of-court dispute settlement to protect consumers is also in the internal electricity market necessary and useful. Hence, in Directive 2009/72/EC is clarified that in particular consumers should have a right to benefit from an out-of-court dispute settlement.⁴⁶¹

4.3.2 Implementation in Directive 2009/72/EC

As a principle, the European Union legislature prepends the theory that a better consumer protection is ensured if consumers is guaranteed an access to an effective out-of-court dispute settlement and methods for a rapid and efficient treatment of complaints are existing.⁴⁶²

The European Union legislature differentiates between the out-of-court dispute settlement and the resolution of complaints. The ratio between the two mechanisms described below is to investigate by considering the function of the regulatory authorities as a dispute settlement body before the out-of-court dispute settlement itself is shown in detail.

4.3.2.1 Complaints against energy service provider

The Member States have to ensure with the newly inserted provision of art. 3 para. 13 Directive 2009/72/EG that an efficient treatment of complaints on the establishment of an independent mechanism in the form of an energy officer or a consumer protection body and the implementation of an amicable agreement will be guaranteed. In Annex I para. 1 lit. f) s. 2 Directive 2009/72/EC is clarified for the first time that consumers have a right to treat their complaints by their provider of electricity services; as already explained in this part 3 under 4.2.2 this term refers to both services of

⁴⁶⁰See Annex A lit. f) Directive 2003/54/EC.

⁴⁶¹Directive 2009/72/EC – recital (42).

⁴⁶²Directive 2009/72/EC – recital (54).

the energy supplier as well as the network operator.

Hence, the European Union legislature distinguishes between the treatment of complaints and out-of-court dispute settlements. This raises the question of whether the handling of complaints as Annex I para. 1 lit. f) s. 1 Directive 2009/72/EC provides according to the previous provision⁴⁶³ is to be regarded as part of the out-of-court dispute settlement. According to the aforementioned in this part 3 under 4.3.1 shown definition this requires that an impartial third party outside the state courts mediates a settlement between the parties to the dispute. Therefore it must be a procedure, by which not just in the dispute prejudiced party itself but a neutral third party with a proposed solution intervenes active for the settlement of the relevant dispute.⁴⁶⁴ As the complaint is dealt under the wording of the Directive by the service provider itself against the complaining consumer, i.e. by the party, against whose service the consumer complaint is addressed, it is therefore not an out-of-court dispute settlement or a part of such a dispute settlement process.

In Annex I para.1 lit. f) s. 3 Directive 2009/72/EC, which states that "Such out-of-court dispute settlement [...] ", there is semantically a reference made on this sentence relating to dispute settlement to the two previous sets of rules, which relate exclusively to the handling of complaints, so does not have any relation to the out-of-court dispute settlement procedures. Accordingly, the European Union legislature creates with the provision in Annex I para. 1 lit. f) Directive 2009/72/EC the impression, that both processes are coupled to each other, i.e. the procedure concerning the handling of complaints is part of the out-of-court dispute settlement process.

For legal systematic reasons and thus for the preparation of clarity with regard to the implementation by the Member States it should be differentiated in Annex I Directive 2009/72/EC between the treatment of customer complaints and the implementation of the dispute settlement proceedings by separate regulations.

⁴⁶³See Annex A lit. f) s. 1 Directive 2003/54/EC.

⁴⁶⁴Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 32.

4.3.2.2 Dispute settlement concerning regulatory matters

The European Union legislature further differentiated between the settlement of disputes under the Directive 2009/72/EC, which is shown below, and that of dispute settlement, which concerns the complaints about regulatory issues, so the disputes with network operators.

Responsible for settling disputes in such regulatory issues should be the regulatory authority.⁴⁶⁵ The regulatory authority should in accordance with art. 37 para. 11 Directive 2009/72/EC as dispute settlement authority bring about within two months a binding decision with the option of extending the deadline after presentation of the complaint of a person concerned, which objects of content to a violation of a network operator. According to art. 32 para. 2 s. 3 Directive 2009/72/EC Member States have to ensure the use of a dispute settlement procedure in favour of network users, who are denied access to the network, so to enable a dispute resolution also with respect to the rights of consumers concerning the network side.

In assessing the question of whether it is a case of out-of-court dispute settlement the fact is harmless that the regulatory decision is legally binding and thus only binding exclusively under the condition that this decision can not be attacked by a remedy. For according to the principle of legality the consumer must not lose its legal protection by the decision of the regulatory authority; the information on the redress provides for the necessary transparency.⁴⁶⁶

The regulatory authority may as arbiter in case of complaints by customers against network operators therefore adopt decisions, that are subject to redress of the losing party. This is a case of out-of-court dispute settlement.

Dispute resolution process is a regulatory authorities assigned more specific method in disputes of network customers against network operators towards the out-of-court dispute settlement within the meaning of Annex I para. 1 lit. f) Directive 2009/72/EC. Thus, it is necessary to make a distinction in this regard both in the aforementioned regulation and in art. 37 para. 11 Directive 2009/72/EC. It should be for reasons of transparency therefore noted in art. 37 para. 11 Directive 2009/72/EC that

⁴⁶⁵Directive 2009/72/EC – recital (38).

⁴⁶⁶Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 33.

the specifications for the out-of-court dispute settlement in Annex I Directive 2009/72/EC apply in the case, where household customers are affected as network customers; should Member States optionally extend the scope of protection beyond the household customer segment the reference to Annex I Directive 2009/72/EC would also be observed for them.

4.3.2.3 Content of the dispute settlement

According to art. 3 para. 7 s. 5 Directive 2009/72/EC is to ensure on national level as after the previous Directive⁴⁶⁷ a high level of consumer protection with regard to dispute settlement procedures. Art. 3 para. 7 Directive 2009/72/EC applies to all end users within the meaning of art. 2 no 9 Directive 2009/72/EC. In order to ensure a high level of protection the consumer must be informed of its rights under such an out-of-court settlement. Because the lack of detailed information means for consumers but also for businesses a major obstacle; the more detailed and specific information of consumers, companies, national bodies for alternative dispute resolution ("ADR entities") and authorities in the Member States of the new measures is of central importance to sensitize the participants stronger and to ensure that consumers and business owners make a use of the ADR entities comprehensively.⁴⁶⁸

Therefore, Member States pursuant to the new regulation by art. 3 para. 12 Directive 2009/72/EC have to ensure that so-called "one-stop shops", which may be part of general consumer information points, will be set up so that the consumers obtain all the necessary informations about such a dispute resolution process; the organization of this mechanism is therefore at the discretion of the Member States.

On the other hand it is under Annex I para. 1 lit. a) Directive 2009/72/EC - as in the previous Directive⁴⁶⁹ - to ensure for household customers mandatory that these customers have a right to a contract with the providers of electricity services, in which the procedure for the initiation of dispute

⁴⁶⁷See art. 3 para. 5 s. 3 Directive 2003/54/EC.

⁴⁶⁸Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Alternative dispute resolution for consumer disputes in the Single Market, COM(2011) 791 final, p. 6.

⁴⁶⁹See Annex A lit. a) slash 7 Directive 2003/54/EC.

settlement proceedings according Annex I para. 1 lit. f) Directive 2009/72/EC is fixed. In Annex I para.1 lit. a) slash 8 Directive 2009/72/EC reference is made on the terminology "electricity undertaking" in relation to the provision of clear informations on the treatment of consumer complaints as well as in relation to the method of initiating procedures for dispute settlements by the electricity service provider. This term is defined in art. 2 no 35 Directive 2009/72/EC as "a natural or legal person carrying out at least one of the functions of generation, transmission, distribution, supply or purchase of electricity for the commercial, technical and or maintenance tasks related to those functions but does not include final customers". Taking into account the use of the term "provider of electricity services" in Annex I Directive 2009/72/EC, which refers with respect to the Member State ensuring of the measures as described in this part 3 under 4.2.2 to both on the supply as well as the network side, it is assumed from a partial congruence of the two terms insofar as the term "electricity undertaking" as generic term contents fully the term "provider of electricity services" and, furthermore, involves, for example, other value chains such as the generation sector.

Annex I para.1 lit. f) Directive 2009/72/EC referenced as before⁴⁷⁰ that the procedures for the out-of-court settlement, inter alia, should allow a rapid settlement of disputes and should provide for the benefit of consumers a refund and compensation system to ensure a cost-neutral implementation of the proceeding in favour of the consumer and therefore its legal certainty. For the first time in the Directive 2009/72/EC a rapid solution is required insofar as this should preferably be done within three months. Thus, the principle of efficiency should be taken into account, after which a speedy procedure handling should be ensured, which is expected particularly in the interests of the consumers as well as equally in the interests of the disputing parties. Hence, the Member States are obliged to implement a guarantee of a rapid completion of the proceeding, where the indication of the period of three months is to be understood as a preferred option proclaimed by the Union. From this proposal in terms of the time corridor Member States may differ.

Furthermore, the Member States have the task to follow, whenever possible, the basic principles presented in the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.⁴⁷¹ Unless Member States obey this recommendation, which is in their discretion, they have besides the

⁴⁷⁰See Annex A lit. f) Directive 2003/54/EC.

⁴⁷¹Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 33.

aforementioned already in the recommendation 98/257/EC enshrined conditions, that must be met by Member States under Directive 2009/72/EC, also to ensure in particular the principle of legality, according to which the consumer does not lose the afforded legal protection despite a decision of the arbitration body by the law of the Member State, in whose territory the body is established.⁴⁷² In the case of an accepted settlement this protection would of course no longer be required. Consumers can take the dispute settlement procedures service; equally consumers can also directly take the legal process, i.e. for taking legal action a previous dispute settlement is not mandatory to perform. Otherwise, art. 6 ECHR would be violated, after which the access to justice for all is to provide without exception as a mandatory fundamental right equally as in art. 47 CFR ensured; thus, dispute settlement proceedings as a out-of-court procedure may not substitute the judicial system.⁴⁷³ However, it does not necessarily follow a general non-binding nature of the decision brought in the context of a dispute settlement. Such would undermine the purpose of the out-of-court dispute settlement with the intention of a rapid and preferably cost-neutral decision for the consumer. Just in the case, where this out-of-court procedure initiated by the parties together with the proviso not going to court, a binding arbitration proposal does not shorten the legal access and does not violate art. 47 ECHR or art. 6 CFR.⁴⁷⁴

4.3.2.4 Need for a cross-sectoral approach

The requirements in the sector-specific Directive 2009/72/EC, that may contribute to the protection of the consumers limited to the respective Member State level, however, may not be enough alone to motivate consumers holistically to participate in the European internal market. Despite the existence of relevant provisions in different sector-specific provisions⁴⁷⁵ on this cross-sectoral activities are required especially for the partially inconsistent quality and due to partly existing competence gaps at the level of the Member States to ensure that in the case of disputes between

⁴⁷²Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 34.

⁴⁷³Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 32.

⁴⁷⁴Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJEC L 115, 17/4/1998, p. 32 et seq.

⁴⁷⁵See in particular art 3 para. 12 Directive 2009/72/EC, art. 3 para. 9 Directive 2009/73/EC, art. 34 Universal Service Directive 2002/22/EC.

consumers and businesses may be brought before certain bodies offering appropriate procedures for alternative dispute resolution. After a study given by the European Commission in 2009 about 750 systems of alternative dispute resolution procedures were identified in the Member States of the EU already, which have processed approximately 530.000 cases in 2008.⁴⁷⁶

The Union has adopted pursuant to this unsatisfactory situation an appropriate policy to achieve a high level of consumer protection concerning disputes between businesses and consumers, which regulates the performance of alternative dispute resolution procedures relating to the sale of goods or provision of services.⁴⁷⁷ The aim of the Directive, which is based on the EU alignment competence of Article 114 TFEU, is to improve the conditions for the establishment and functioning of the internal market through the provision of impartial, transparent, effective and fair method of alternative dispute resolution by independent bodies. This competence of the EU lies in the fact that increasing differences in the national policies of the Member States with regard to the procedures for alternative dispute resolution cause a growing fragmentation in this area, which in turn would contribute to unequal treatment for consumers and businesses and thus relates diverging levels of consumer redress within the EU.⁴⁷⁸

The Directive on consumer ADR, which is to be implemented by the Member States within two years until 9 July 2015, is complemented by the Regulation on Online dispute resolution of consumer disputes.⁴⁷⁹ It is envisaged that the Commission creates a European platform for online dispute resolution; this is an interactive website in all official languages as a focal point for consumers and business owners, who want to settle the dispute in accordance with this Regulation out of court.⁴⁸⁰

476DG Sanco Study on the use of Alternative Dispute Resolution in the European Union – Final Report Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), 16/10/2009, p. 8, 26.

477Directive 2013/11/EC of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJEC L 165, 18/6/2013, p. 63 et seq. (Directive on Consumer ADR), Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), COM(2011) 793 final, p. 4.

478Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), COM(2011) 793 final, p. 6.

479Regulation (EC) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJEC L 165, 18/6/2013, p. 1 et seq.

480Hirsch, in NJW 29/2013, p. 2088 at p. 2093.

The differences between the ADR entities in terms of coverage, quality and reputation in the Member States constitute an obstacle to the internal market and are one of the reasons, why many consumers do not shop across borders and do not trust that any disputes between companies can be resolved in a simple, quick and cost effective manner.⁴⁸¹ In order for consumers to fully exploit the potential of the internal market ADR should be available for all types of domestic and cross-border disputes covered by this Directive as well as comply with applicable uniform quality requirements throughout the Union and consumers and business owners should be aware of the existence of such procedures.⁴⁸² These observations apply equally to in Annex I Directive 2009/72/EC listed energy services and related dispute resolutions.⁴⁸³

Pursuant to art. 2 para. 3 Directive on Consumer ADR in relation to consumer affairs shall be established harmonized quality requirements for ADR entities and ADR procedures to ensure that after its implementation consumers regardless of where they reside in the Union have access to high-quality, transparent, effective and fair out-of-court redress mechanisms, in which Member States may retain or introduce provisions, going beyond such requirements laid down in this Directive to ensure a higher level of consumer protection.

As a result of the aforementioned existing deficits concerning divergent practices of the Member States in the implementation of dispute settlement procedures into national law the initiated *modus operandi* of the EU legislator is necessary. This applies also with respect to the target of the competition of the internal market, where uniform predetermined assumptions and parameters strengthen consumer protection relating to the dispute settlement and so also contribute to the conclusion of cross-border transactions significantly.

481 Directive on Consumer ADR 2013/11/EC - Recital (6).

482 Directive on Consumer ADR 2013/11/EC - Recital (7).

483 DG Sanco Study on the use of Alternative Dispute Resolution in the European Union – Final Report Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), 16/10/2009, Annex 1, where the various procedures in relation to all Member States also concerning the energy sector are represented in tabular form in detail.

4.3.3 Interim conclusion

Although the European Union legislature differentiates between the treatment of complaints and out-of-court dispute resolutions he does not, however, differentiate clearly between the two mechanisms in Annex I para. 1 lit. f) Directive 2009/72/EC and does not clarify the fact that they represent different procedures.

Within the meaning between the dispute resolution by the regulatory authorities as dispute settlement authority in the sense of art. 37 para. 11 Directive 2009/72/EC and this in Annex I para. 1 lit. f) Directive 2009/72/EC codified dispute settlement a delimitation is not made; the ratio of the two mechanisms to each other is not regulated. The legislator should dissolve this uncertainty by making it clear that, for example, with regard to disputes with the network operator the regulatory authority is responsible and active only as an out-of-court settlement body; therefore, art. 37 para. 11 Directive 2009/72/EC would proceed as a specific rule on jurisdiction in such disputes over other schemes. However, the customer protection-related provisions in the case of such disputes with network operators involved household customers in particular concerning transparency requirements and information obligations of Annex I para. 1 Directive 2009/72/EC would apply to the protection of such consumers in addition. It should therefore be added in Annex I para. 1 Directive 2009/72/EC for clarification purposes “that art. 37 para. 11 Directive 2009/72/EC remains unaffected”. Furthermore, it should be made clear in art. 37 para. 11 Directive 2009/72/EC that at least in the case of residential customers Annex I para. 1 lit. f) Directive 2009/72/EC has to be noted supplementary .

Regardless of the aforementioned deficits Directive 2009/72/EC emphasizes with new regulations over the previous Directive the importance of an alternative dispute resolution in favour of consumer protection on the level of the Member States. By accessing of the informed consumer in terms of his rights and options in respect of such impartial, effective, transparent and fair proceedings his confidence is basically strengthened in the internal electricity market. This is necessary to improve the legal security of the consumer and harmonizes with the demand of the European Union legislature concerning the promotion of cross-border issues in the energy sector such as the trading of electricity and the electricity supply to the creation of a competitive internal market for electricity.⁴⁸⁴

⁴⁸⁴See art. 6 para. 1 Directive 2009/72/EC.

However, this energy sectoral approach, which is implemented differently and has already been implemented differently in the past into national law due to the discretion of the Member States, may not suffice to ensure an effective and appropriate handling of domestic and cross-border consumer disputes at a uniform level of quality in the sense of a holistic cross-sectoral approach and a widest possible harmonization in this respect. The differences in national policies in this respect show already that unilateral national measures can not lead to satisfactory solutions for consumers and businesses of disputes concerned parties.⁴⁸⁵

For this reason, there is urgent need for action of the European Union legislature, which is already complied with the measures adopted. To encourage consumers to conclude especially cross-border despite language barriers different legal systems and any associated higher costs they must have the ability to enforce their rights also uncomplicated in case of doubt. As a prerequisite for consumers to get confidence in the internal market effective procedures, which provide them with realistic opportunities to enforce their rights at reasonable costs, must be available.⁴⁸⁶ Especially responsible and prudently acting consumers serving the internal market in electricity will demand this central right at Union level and would perceive a rejection of such a right as a barrier to competition.

The new legal framework documents the meaning given at EU level the issue of alternative dispute resolution for consumer disputes.⁴⁸⁷ However, it remains to be seen whether the new Directive on Alternative Dispute Resolution in consumer affairs as well as the accompanying Regulation on Online Dispute resolution of consumer disputes could lead to an increase in the level of consumer protection based on national level referring to dispute resolutions also in the internal electricity market in the future, and will thus improve the confidence of consumers to participate in cross-border activities in the electricity sector.

485Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), COM(2011) 793 final, p. 7.

486Communication from the Commission on “Widening Consumer Access to Alternative Dispute Resolution“, COM(2001) 161 final, p. 2.

487Gundel, in RdE 2014, p. 132 at p. 136.

4.4 Energy sector-specific regulatory law - consumer protection

Against the background that competition alone cannot ensure the proper provision of public services of the grid-based energy sector under certain conditions as described in part 1 under 2.3.4 in the consumer interest the question arises how the individual in this part of the work already shown as well as the significant network-related consumer rights described below can be protected by energy sector-specific regulatory law in the Directive 2009/72/EC. First of all the basic as well as energy sector-specific purpose direction intended with the regulatory law will be presented. In terms of regulatory legal enforcement options is referenced to the dispute settlement illustrated in this part 3 under 4.3.2.2, which also covers the network sector; regulatory-legal as well as other possible enforcement options of consumer rights are not shown.

4.4.1 Purpose of regulation

Numerous Directives recently concerning regulated markets especially also Directive 2009/72/EC connect the privatization of former state monopolies with the perspective that an active customer makes use of the advantage of competition between suppliers and takes claim of the best of each offer for him; regulatory logic is not limited only to private customers but aims also through appropriate rules to ensure new providers so, for example, energy suppliers access to markets by reducing access barriers to the internal market.⁴⁸⁸ It should therefore be ensured by the Member States in the form of the national regulatory authorities that certain private legal obligations are implemented and thus the performance of certain tasks is guaranteed especially in favour of the consumer properly. Private law in this sense is therefore no longer just with respect to autonomy and self-binding related system of organizing private action in a market society; private law is subjected to the functionality of competition and regulation.⁴⁸⁹

In line with in the marketplace active consumer regulation is a so-called market-based regulatory law, whose task is object to establishing and securing a competitive market in cases of so-called market failure or other functional weaknesses of the market, which overwhelm a given competition

⁴⁸⁸Micklitz, in GPR 2010, p. 2 at p. 3.

⁴⁸⁹Micklitz, in GPR 2009, p. 254 at p. 257.

merely selectively, reactive accompanying general competition law.⁴⁹⁰ Regulation is therefore not an end in itself, but serves to ensure a non-discriminatory access to the networks after the opening of markets, and both to establish and secure an effective and undistorted competition; regulation provides therefore a “level playing field” by ensuring fair and reasonable priced network access conditions as well as the prevention of abuse of market power.⁴⁹¹ It has therefore the key task of balancing the interests of all segments of the energy market to ensure that consumers receive the energy they need at a fair value.⁴⁹²

Accordingly, based on Directive 2009/72/EC the intended purpose of the regulation is to ensure that national regulatory authorities take care for the proper performance of the aforementioned duties addressed to the companies such as network operators for the benefit of customers so also the consumers by pretending the proper application of the law enshrined in the Directive as well as monitor its compliance with and enforce this if necessary to ensure a workable competition. Regulation is therefore based on the network area and further analysed and defined from the contrast with competition law; generally, therefore regulation should reach sub delegation because of the greater intensity of intervention as competition law and therefore only be applicable when the latter is not sufficient to eliminate barriers to competition.⁴⁹³ A classic use case in this regard represents the state regulation of the network as a natural monopoly and thus the network operator insofar as this concerns in particular the granting network access and determination of network tariff in favour of the network customers. Regulating exercising from a State economic supervisory mandate thus moves in relation between firstly the State in the form of the national regulatory authority, secondly the regulated companies and thirdly the customers and thus also consumers as addressees protected by the State regulatory order. Within this triangle the interweaving of private and public service standards for the regulation right is characteristic.⁴⁹⁴ Under the regulatory-legal consumer protection the privatization of public services of general interest and the obligation of private sector offerings

490Bumke, in *Die Verwaltung* 41 (2008), p. 227 at p. 229; Säcker, in *AöR* Bd. 130 (2005), p. 180 at p. 188 et seq.; Hellermann, in *VVDStRL* Bd. 70 (2011), p. 366 at p. 369 et seq.; Möstl, in *GewArch* 2011, p. 265, where reference is made under footnote 17 to the extended term “regulation“, which is represented in this footnote in detail.

491Henseler-Unger, in *GewArch Beilage WiVerw* 02/2010, p. 111 at p. 114.

492ACER – Discussion Paper on Energy Regulation: A Bridge to 2025 Consumers and Distribution Networks 6 November 2013, p. 1 at p. 2.

493Döhler/Wegrich, in *dms – Zeitschrift für Public Policy, Recht und Management*, Heft 1/2010, p. 31 at p. 36.

494Bumke, in *Die Verwaltung* 41 (2008), p. 227 at p. 242; Micklitz, in *GPR* 2009, p. 254 at p. 257; Hellermann, in *VVDStRL* Bd. 70 (2011), p. 366 at p. 374.

intertwine; because on the one hand, e.g. public or semi-public companies as public utilities as private provider of energy services are subject to the regulatory law, on the other hand the legal relationship of private companies such as energy suppliers and customers as end users, which otherwise is subject to a private consumer protection law, is overlaid as public law by regulatory law.⁴⁹⁵ In Europe the decision between confidence in the market self-regulation and governmental supervision was chosen in favour of the latter and the public instruments were expanded continuously, so that one could speak of a “Publification” of European business law.⁴⁹⁶

Regulatory law also related to the energy sector in private as well as public legal form aims therefore the protection and thus the strengthening of consumer interests for ensuring a high level of consumer protection given in art. 169 para. 1, art. 114 para. 3 TFEU and art. 38 CFR of primary legislation.

4.4.2 Regulatory law consumer protection by Directive 2009/72/EC

These regulatory requirements on the electricity sector, which have to be implemented by the Member States also insofar as they relate to consumer protection, are regulated in the Directive 2009/72/EC.

First of all the basic functions, that are assigned to the regulatory authorities by the Member States by virtue of the Directive 2009/72/EG, should be clarified as part of the presentation. Furthermore, it is to present in this context, which consumer protection law regulating possibilities against providers of energy services to the safeguarding of statutory and contractually imposed consumer rights, already shown in this part of the work, with the target of ensuring a functioning competition exist.

In addition, the consumer protection law will be examined with respect to the distribution system operator side and the related consumer protection regulatory law.

Further, existent rights of the Commission, that monitors and examines the application of Directive

⁴⁹⁵Hellermann, in VVDStRL Bd. 70 (2011), p. 366 at p. 373 et seq.

⁴⁹⁶Ruthig/Storr, Öffentliches Wirtschaftsrecht, p. 5 para. 7.

2009/72/EC and submits in accordance with art. 47 para. 1 Directive 2009/72/EC an annual report in the sense of a progress report to the European Parliament and Council, are not investigated. In this report, inter alia, the accumulated experiences, the achieved progress and remaining barriers due to the creation of a complete and fully operational internal electricity market are treated in accordance with art. 47 para. 1 lit. a) Directive 2009/72/EC as well as the effectiveness of the regulation according art. 47 para. 6 Directive 2009/72/EC including the question, to which extent small businesses and household customers take advantage of the market opening, is examined.

4.4.2.1 Function of regulatory authorities

Each Member State has to designate under the new provision of art. 35 para. 1 Directive 2009/72/EC a single national regulatory authority, whose independence based on a functional separation and legal independence from other public and private institutions⁴⁹⁷ as well as exercise of powers impartially and transparently in accordance with art. 35 para. 4 Directive 2009/72/EC is to ensure. Through this in art. 35 para. 4 lit. b) ii) Directive 2009/72/EC regulated full independence from instructions, according to which the regulatory authority neither catches nor accepts instructions from any government in its task of perception⁴⁹⁸, the staff including the management of the regulatory authorities should not be subjected to additional political pressure.

After the European Union legislature has determined that the effectiveness of regulation is often limited due to the lack of independence of the Member State government and insufficient powers and discretion⁴⁹⁹ he has stipulated in contrast to the previous Directive⁵⁰⁰ both with regard to the obligation of the Member States to design the independence of regulatory authorities and in terms

⁴⁹⁷See art. 23 para. 1 s. 1 et seq. Directive 2009/72/EC, according to which one or more competent bodies, which are only wholly independent from the interests of the electricity industry, are designated with the function of regulatory authorities.

⁴⁹⁸Holznagel, Die politische Unabhängigkeit der Bundesnetzagentur – Holznagel concludes on the example of FRG, that the breakthrough of the ministerial principle of terms of legitimacy would be possible under European law as well as basically compatible with national law, because the regulated network economies represent another new exception by the fundamental ministerial subordination in the sense of the constitutional principle of democracy; however, this explicit instruction exemption should be enshrined in the Constitution of the FRG (in art. 87 et seq. Constitution).

⁴⁹⁹Directive 2009/72/EC – recital (33).

⁵⁰⁰See art. 23 Directive 2003/54/EC, where the regulation was codified only in a provision under VII. “Organisation of access to the system“.

on the determination of the individual regulatory-objectives, -tasks and -powers according art. 35 et seq. Directive 2009/72/EC a much higher level of detail and degree of specificity under a separate chapter IX. "national regulatory authorities".

In order to ensure the aim of a functioning internal electricity market thus, the position of the regulation was upgraded by the new Directive 2009/72/EC significantly by equipping the regulatory authorities to achieve this set target on all relevant regulatory issues with a corresponding decision-making power, which is binding on the electricity companies and can be sanctioned accordingly for non-compliance.⁵⁰¹ This applies as will be seen below in particular the protection of consumers in relation to objectives as well as allocations of tasks and powers fixed in Directive 2009/72/EC.

According to the general objective list of art. 36 Directive 2009/72/EC the regulatory authorities have the power, among other things, to take appropriate actions to provide that customers benefit through the efficient functioning of the national market, promoting effective competition and contribute to ensure consumer protection and to achieve high standards of universal service including the protection of vulnerable customers.⁵⁰² In this context, regulatory authorities have in particular the task to observe level and effectiveness of the market opening and competition at retail level including the scope of customer protection measures listed in Annex I Directive 2009/72/EC according art. 37 para. 1 lit. j) Directive 2009/72/EC and to contribute in accordance with art. 37 para. 1 lit. n) Directive 2009/72/EC with other authorities that consumer protection measures including those set out in Annex I Directive 2009/72/EC are effective, so that the providers of energy services have to comply with them and be enforced against them if necessary.⁵⁰³ According to art. 37 para. 4 s. 1 Directive 2009/72/EC Member States should ensure that the regulatory authorities are equipped with the necessary powers in particular with special rights to obtain informations, conduct investigations, powers to instructions as well as powers to impose sanctions for the fulfillment of the aforementioned tasks.⁵⁰⁴

⁵⁰¹Directive 2009/72/EC – recitals (34), (37), (38).

⁵⁰²Art. 36 lit. g), lit. h) and recital (37) Directive 2009/72/EC.

⁵⁰³Directive 2009/72/EC – recital (51), according to which consumer interests are in the center of this Directive and consumer rights should be enforced by regulatory authorities, where Member States have so provided.

⁵⁰⁴Directive 2009/72/EC – recital (38).

From the aforementioned analysis it is clear that regulatory supervision has been extended significantly in contrast to the previous policy to other value chains of the electricity industry over the network area beyond including also areas where competition indisputably exists; with the new approach securitized in the Directive 2009/72/EC it is to be enforced therefore a market outcome control in the electricity market insofar as besides the traditional powers by the antitrust authorities as from now the regulatory authorities are equipped with additional powers of intervention.⁵⁰⁵ This also refers to consumer rights already presented in this part 3 under 4.1 and 4.2, that primarily relate to the distribution sector including the need to protect the final customers as well as the universal service as a public service obligation. This is a newly introduced comprehensive market-based sector-specific regulatory law, which aims at the control of market outcomes in order to avoid disadvantages for consumers⁵⁰⁶, to ensure a high level of consumer protection through various especially preventive measures.

4.4.2.2 Regulatory measures concerning network side

Regulatory measures with respect to the basically not duplicable network infrastructure of the electricity sector as a de facto monopoly relate mainly on access to the network and the network tariff regulation from the perspective of consumer protection. Therefore, only these two regulatory measures in relation to distribution system operators should be represented below, however, measures concerning the transmission network sector are not considered.

4.4.2.2.1 Network access regulation and consumer protection

Fundamental precondition for the initiation of competition in relation to the network infrastructure is due to the basically non duplicability of the networks the obligation of the network operators to ensure that they operate the networks available for use by third parties, i.e. to eliminate the

⁵⁰⁵Ehricke, in RdE 2008, p. 159 at p. 161, 164.

⁵⁰⁶Ehricke, in RdE 2008, p. 159 at p. 166 et seq. - the question should not be addressed, whether these extended powers of intervention of regulatory authorities with respect to such areas, where there is already competition and in which no violations of competition rules exist, would be compatible with the principle of undistorted competition or so that so far recognized market regulatory fundamental decisions of the EC Treaty (now TFEU) would be in Ehricke's opinion violated.

originally existing exclusive rights in favour of energy companies and thus to open the networks to the benefit of competition, i.e. to the final customers on the distribution side. For the specificity of the conducted electricity market with its natural, technical-related monopolies and thus the particularity of the network access is caused in terms of the distribution networks operating network operators in relation to such companies without their own network infrastructure straight from the fact that these companies intend the supply of final customers and therefore are dependant on ensuring a functioning network access system.⁵⁰⁷

Under European law the request of so-called third suppliers is made by means that the Member States was imposed as far according art. 32 para. 1 Directive 2009/72/EC⁵⁰⁸ the mandatory implementation of the introduction of a system for such a network access for the benefit of eligible customers as defined by art. 33 Directive 2009/72/EC⁵⁰⁹ on the basis of published tariffs and reasons for refusal according art. 32 para. 2 Directive 2009/72/EC, which largely adapted the previous regime⁵¹⁰, are possible only within narrow limits. Due to the amendments to these rules now the protection of consumers is further enhanced insofar as a refusal of network access under art. 32 para. 2 s. 2 Directive 2009/72/EC should be based solely on objective and technically as well as economically reasonable criteria. Here, pursuant to art. 32 para. 2 s. 2 Directive 2009/72/EC a uniform application of these criteria must be guaranteed. Thus, compliance with the obligation of transparency on the one hand and the prohibition of discrimination on the other hand is again required. Furthermore, the network user, who has been denied access to the network, can avail the option of a dispute settlement procedure within the meaning of art. 37 para. 11 Directive 2009/72/EC, as explained already in this part 3 under 4.3. Those by the European Union legislature inserted additions serve to protect the consumer twice on the one hand directly in relation to his own attributable and permissive right by the network operator to a non-discriminatory network access and on the other hand in relation to the protection of energy suppliers against abuse of a dominant position by the network operators; for only through the granting of this right the consumer is in a position to take part as a competitive participant in the market with the option of an electricity supply by a supplier of his choice and is equally as the energy supplier to protect by granting a non-

⁵⁰⁷Horn, in RdE 2003, p. 85 at p. 88; Britz, in RdE 1997, p. 85 at p. 89.

⁵⁰⁸See art. 20 para. 1 s. 1 Directive 2003/54/EC.

⁵⁰⁹See art. 21 Directive 2003/54/EC.

⁵¹⁰See art. 20 para. 2 Directive 2003/54/EC.

discriminatory network access and thus take advantage of its benefits for himself.

Customers within the meaning of art. 32 para. 1 s. 1 Directive 2009/72/EG are those, who use the network, i.e. all system users in the sense of art. 2 no 18 Directive 2009/72/EC. According to the legal definition this is "a natural or legal person, supplying to or being supplied by a transmission or distribution system". In addition to the customers the term relates in particular to such energy suppliers regulating the network access based on the respective delivery points of their acquired retail customers, that conclude a "contract package" with their supplier consisting exclusively of network and sales side with the network operator and thus take advantage of it.⁵¹¹

The Member States are obliged to implement the aforementioned guidelines; however, this national implementation obligation in terms of the elimination of barriers to entry and the granting of network access only to ensure the competition is not sufficient. Rather in addition, the network access conditions have to conform to objective criteria and must be non-discriminatory in favour of network users. For, according to the European Union legislature discriminatory network access, which is a prerequisite for downstream access to final customers, as well as an effective regulatory oversight did not exist yet at the time of the adoption of the Directive in all Member States.⁵¹² Therefore, according art. 37 para. 6 Directive 2009/72/EC the national network access conditions as before⁵¹³ are to define prior to their entry, i.e. ex-ante, and to publish according art. 37 para. 7 Directive 2009/72/EC. This publication requirement represents a non-existent revision in relation to the previous Directive.

According to art. 25 para. 3 Directive 2009/72/EC the distribution system operators have to provide to the system users as before⁵¹⁴ the information needed for efficient access, with this duty now refers also to informations on an efficient network usage due to the newly inserted supplement in the aforementioned provision. According to art. 37 para. 10 s. 1 Directive 2009/72/EC the regulatory authority is empowered as by the previous provision⁵¹⁵, if necessary, to demand of the distribution

⁵¹¹See footnote 299.

⁵¹²Directive 2009/72/EC – recitals (4), (26).

⁵¹³See art. 23 para. 2 lit. a) Directive 2003/54/EC.

⁵¹⁴See art. 14 para. 3 Directive 2003/54/EC.

⁵¹⁵See art. 23 para. 4 Directive 2003/54/EC.

system operators changing of the network access conditions to ensure that they are applied appropriately and without discrimination.

So the Union law requires by the Member States in relation to the network access systems through the distribution network operators to ensure both compliance with the requirement of transparency and the prohibition of discrimination for the benefit of end users but also energy suppliers. The petitioners of network access should be facilitated the network access by defining the conditions for network access, which are carried out ex-ante and must be published supplementary in advance in the sense of an information regulation following the principle of transparency and thus aimed at a preventive purpose of protection in favour of network users. Such a required publication of network access conditions ex-ante ensures from the perspective of potential petitioners of the network access that the targeted network access for network clients is predictable from the beginning, which should motivate them in addition to use this option as an essential prerequisite for the initiation of competition. Without the guarantee of such a market entry and thus the granting of this fundamental right of access to the network any competition would be nipped in the bud from the beginning.

The warranty of the non-discriminatory network access notably in favour of energy suppliers with specified ex-ante rules for the purpose of supply to the end user represents a fundamental consumer protection right from the viewpoint of the individual consumer as a basic condition, that behaves in principle as "conditio sine qua non" for promoting a participation of consumers in the competition.

In addition, the protection of consumers is further strengthened by the fact that by regulators to ensure reasonable and discriminatory network access conditions of distribution system operators, if necessary, a change in these terms and conditions may be required ex-post, so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market especially to household and small non-household customers.⁵¹⁶

To achieve the objective of strengthening consumer protection and hence of competition the network access regulation is linked in the sense of a regulation by an ex-ante determination of the network access conditions with the transparency principle following information regulation, so with a previous publication requirement of network access conditions. Through the regulatory legal abuse

⁵¹⁶Directive 2009/72/EC – recital (26).

control ex-post with respect to the verifiability of these network access conditions connected with a change request addressed to the distribution network operators the consumer protection ideas will be given additional emphasis.

Many new rights in favour of the regulation, which intend the consumer protection and its strengthening, are securitized in Directive 2009/72/EC. However, the future will be crucial, to which extent Member States are in a position to install these by art. 37 para. 13 Directive 2009/72/EC required effective regulatory and control mechanisms, to ensure transparency and to prevent the abuse of a dominant market position as well as predatory behaviour in particular to the detriment of consumers. Until the entry into force of Directive 2009/72/EC Member States were not able to fulfill this order enshrined in the predecessor Directive⁵¹⁷ as aforesaid investigation also shows.

4.4.2.2.2 Network tariff regulation and consumer protection

Closely intertwined with the network access regulation is to ensure a non-discriminatory cost-based network tariff regulation; for, the result of the regulation so the amount of the network charges has a decisive effect on the entry of new energy traders, the associated possibilities of changing suppliers for the benefit of consumers and hence the facilitation of participation in competition from both of these traders as well as consumers as final customers.

The network tariff regulation follows a cost-based approach.⁵¹⁸ The tariffs or their methods for determining are therefore as before⁵¹⁹ to be designed according art. 37 para. 6 lit. a) Directive 2009/72/EC so that necessary investment incentives to the benefit of the network operator persist. The regulatory moves in this respect in a conflict of interests between the provision concerning the lowest possible network charges with the aim of the promotion of a market opening in favour of the network users and thereby the competition on the one hand and ensuring the security of supply by granting a satisfactory return on capital to ensure investment incentives in favour of the network operators on the other hand. This conflict of interests equally has an impact on customers as system

⁵¹⁷See art. 23 para. 8 s. 1 et seq. Directive 2003/54/EC.

⁵¹⁸Directive 2009/72/EC – recital (36).

⁵¹⁹See art. 23 para. 2 lit. a) Directive 2003/54/EC.

users and thus consumers insofar, as they are also highly interested in both namely in maintaining the security of supply as a public service obligation in the sense of art. 3 para. 2 Directive 2009/72/EC, that the network operators have to ensure, as well as in the adequacy of network tariffs.⁵²⁰ Network tariff regulation, which serves undoubtedly consumer protection, however, is to be regarded also under the absolute requirement of supply security mandatory under this aforesaid point of view. For, the EU citizens should be able to rely in particular on the security of supply and adequacy of prices, which include according to the purpose of the Directive in addition to the electricity prices also the network tariff rates, that the public service obligations are met.⁵²¹

The relationship between competition law and sector-specific regulatory law will not be represented in this context.⁵²² It is merely to point out that due to the specifications within the Directive 2009/72/EC and the relevant national implementation with regard to the use of the network infrastructure tendentially a sector-specific regulation is carried out, which displaces the national antitrust law in this regard; nevertheless, art. 101 et seq. TFEU as rules of EU competition law are in the same way as the national antitrust law furthermore to be directly taken into account at the level of the Member States in particular with respect to the merger control, the prohibition on restrictive agreements and the control of behaviour concerning dominant or strong market companies in the form of antitrust abuse rules in the non-regulated sector in favour of energy companies as market participants.

Member States have pursuant to art. 32 para. 1 s. 2 Directive 2009/72/EC, which corresponds to the regulation of the previous Directive⁵²³, to ensure that network access tariffs or their methods of calculation are approved ex-ante and published periodically before its entry into force. According to the newly introduced provision of art. 37 para. 1 lit. a) Directive 2009/72/EC responsible for this are the regulatory authorities, which have to observe in this respect the principle of transparency. Furthermore, regulators have to ensure under art. 37 para. 1 lit. f) Directive 2009/72/EC, that goes beyond the current rule⁵²⁴, the elimination of cross-subsidies between network operators and utilities

⁵²⁰Directive 2009/72/EC – recital (46).

⁵²¹Directive 2009/72/EC – recital (50).

⁵²²See footnote 506.

⁵²³See art. 20 para. 1 s. 1 Directive 2003/54/EC.

⁵²⁴See art. 23 para. 1 lit. e) Directive 2003/54/EC, according to which the elimination of cross-subsidies was to measure solely to the compliance with the requirement of effective unbundling of accounts pursuant to art. 19

within a vertically integrated composite. Due to the price regulation it is to ensure therefore that the network tariffs are transparent and applicable to all system users on a non-discriminatory basis equally.⁵²⁵ As before⁵²⁶, it is up to the regulatory authorities according art. 37 para. 6 lit. a) Directive 2009/72/EC to carry out the aforesaid obligations ex-ante so just in time before the entry into force of the determination of the methods or the approval of the tariffs.

New in turn is the provision of art. 37 para. 7 Directive 2009/72/EC, according to which the methods or conditions for the determination of the tariffs are to be published. This obligation of publication of these methods is already demanded by the Member States under art. 32 para. 1 s. 2 Directive 2009/72/EC equally as under the previous Directive.⁵²⁷

The regulators are according art. 37 para. 10 s. 1 Directive 2009/72/EC authorized as by the previous regulation⁵²⁸, if necessary, to demand of the distribution system operators the change of the network charge tariffs as well as their methods of determination to ensure that they are implemented appropriately and in a non-discriminatory manner. In contrast to the original provision the European Union legislature has significantly supplemented art. 37 para. 10 s. 2 Directive 2009/72/EC insofar as in the case of a delay of the required determination by the network operator the regulatory authorities are even authorized for a preliminary determination of the network access tariffs or their methods. The regulatory authority and thus the State are therefore authorized to act in place of the network operators in the way of a legislatively mandated execution by substitution for the purpose of protecting competition. According to art. 37 para. 12 s. 1 Directive 2009/72/EC the network operator has in this case the possibility of filing an appeal. This, however, has according to art. 37 para. 12 s. 2 Directive 2009/72/EC no suspensive effect as under the preceding Directive.⁵²⁹ With this new rules of a possible execution by substitution connected with a non-suspensory effect in the case of filing an appeal the elementary importance, which the European Union legislature grants the protection of competition, is significantly. To achieve the objective that all consumers in the wider

Directive 2003/54/EC and only a monitoring in this respect was to carry out.

⁵²⁵Directive 2009/72/EC – recital (32).

⁵²⁶See art. 23 para. 2 lit. a) Directive 2003/54/EC.

⁵²⁷See art. 20 para. 1 s. 2 Directive 2003/54/EC.

⁵²⁸See art. 23 para. 4 Directive 2003/54/EC.

⁵²⁹See art. 23 para. 6 Directive 2003/54/EC.

context of the Union, so in addition to the final customers also the energy suppliers draw advantage from a competitive market consumers rights, should be enforced by the regulatory authorities.⁵³⁰

Equally as the network access the fixing of the network charges respectively their methods of determination ex-ante is intertwined with an information regulation, i.e. a previous publication requirement of the network operator under mandatory compliance with the principles of transparency and non-discrimination. In addition, appropriate regulatory competences ex-post provide for compliance with these principles. It is particularly noteworthy that in order to comply with these principles in the sense of competition and thus consumer protection the regulatory authority has been given now the possibility of a ex-post correction, which can be effectively enforced, if necessary, by way of a legally mandated execution by substitution.

4.4.3 Interim conclusion

Regulation in relation to the companies operating in the consumer market is classified as market-based regulatory law in the context of this investigation. It aims by ensuring transparent and non-discriminatory measures both related to the network sector as the de facto monopoly as well as the distribution and thus the competition sector to protect consumers and by this means to pursue the further opening of the internal electricity market.

To achieve this protection purpose the tasks, powers and enforcement capabilities in favour of national regulatory authorities in the Directive 2009/72/EC compared to the provisions of the previous Directive 2003/54/EC were significantly expanded and considerably upgraded with a very high level of detail.

Thereby, the regulatory powers in relation to the competition area and thus the electricity sales sector were recently extended to a market outcome control to protect consumers. On the network side the key consumer protection rights and thus consumer protection in relation to the guarantee of network access through transparent and non-discriminatory conditions were equally as alike to ensuring adequate network charges heights strengthened by the fact that regulatory authorities are equipped with numerous setting powers ex-ante as well as equally control and enforcement powers

⁵³⁰Directive 2009/72/EC – recital (51).

ex-post, which include even the order of a regulatory authority execution by substitution.

The course for the achievement of a high level of consumer protection also from the regulatory legal point of view is provided by the Union legislator. However, remains to be seen how far the Member States in the framework of the implementation of the secondary legislation requirements into national law are able to fulfill this order of the EU.

5 PART 4 - CONCLUSION

It is provided a representation of the results obtained in this investigation including the existing regulatory deficiencies for the energy sector-specific consumer protection. Statements are derived from it. This thesis concludes with an overall summary as well as an outlook in terms of the completion of the ongoing electricity internal market with regard to consumer protection.

5.1 Results of the investigation

5.1.1 Possible competence title

The sector-specific consumer protection securitized in the Directive 2009/72/EC as a cross-sectional area is captured of the EU standard on the alignment in the internal market according to art. 114 TFEU. The requirements with regard to the authorization for the approximation of national provisions exist also insofar as these affect consumer protection rights enshrined in Directive 2009/72/EC.

However, art. 169 para. 2 lit. b) TFEU justifies no final internal market measures and deposits equally such as art. 169 para. 2 lit. a) TFEU as the basis of competence, that establish any powers beyond the internal market competence. Therefore art. 169 TFEU includes a solely declaratory function from the competence perspective.

The new energy law expertise title of art. 194 TFEU introduced with the entry into force of the Lisbon Treaty would displace as an energy-specific competence title and thus as *lex specialis* regarding the alignment of the previous general competence title of art. 114 TFEU completely. This would apply also to the energy-specific consumer protection law, according to which art 194 TFEU would replace the previous aforementioned general competence title of art. 114 TFEU as well.

5.1.2 Legal fragmentation - approximation of laws

The energy sector-specific consumer protection law legally securitized in Directive 2009/72/EC is according to the trend of other consumer protection fields at the level of Member States also fragmented. This fragmentation refers to both the competition relevant distribution side and the network side as a natural monopoly.

The reduction of this fragmentation is necessary notably against the background that cross-border activities will increasingly be promoted in the energy sector and consumers should benefit in this regard of the competitive market at European level with respect to both areas.

First, a dogmatically uniform basic concept and thus a coherent consumer protection law, which also touches the energy sector-specific consumer law, is to implement within the EU legal acts. Furthermore, at Member State level a consolidation also of the energy sector-specific consumer protection legislation must be realized by legal harmonization with the principle of so-called mixed harmonization is to give priority.

For, a mandatory essential balance between the two approaches of harmonization namely the full as well as minimum harmonization will contribute best to the achievement of the objective of a high level of consumer protection in the energy sector by promoting in addition to mandatory to be implemented requirements of the EU as well as in the framework of the national competition for the best solutions also a "best-practice" at the level of the Member States; thus a levelling on the lowest level of protection in the sense of a "race to the bottom"⁵³¹ will be avoided.

Such a market benefiting as well as a market regulating steering function to the consumer performing alignment helps to ensure a functioning competition.⁵³²

⁵³¹See footnote 188.

⁵³²See footnote 339.

5.1.3 Energy sector-specific consumer protection law - deficits

5.1.3.1 Universal service, vulnerability, energy poverty - findings and regulatory deficiencies

The current legal framework and its clarification as well as additions with respect to the universal service obligation under art. 3 para. 3 Directive 2009/72/EC and according to the vulnerability as well as energy poverty under art. 3 para. 7 Directive 2009/72/EC contribute to the improvement of the level of consumer protection compared to the preceding legal framework of Directive 2003/54/EC. Mandatory implemented Directive requirements provide a greater degree of harmonization of the Member State sector-specific consumer protection. Between those requirements of the Union and existing Member State implementation discretion exists an appropriate balance for proper consideration of national specificities and differences.

With the wide consumer term fixed in the Directive, which refers on the basis of the ECJ case law on the model of a responsible, prudently acting consumer, the European Union legislature demonstrates the factual context between a competitive electricity market and consumer protection. To be protected is such on adequate and transparent information relying consumer, who takes an active part in the competition; not worthy of protection, however, is the inattentive, careless acting consumer.

In addition to the following control deficiencies, that need to be removed in a subsequent Directive competence, limits of the Union are also present.

The non-assignable and thus indefinite term variety, which is used in connection with the determination of the protected addressees as consumers, will contribute both to further promote the already existing differences in Member State level of harmonization and thus to an intensification of competitive distortions. This concept of diversity is to diminish with a unique clear allocation between the individual consumer groups and thus consumer types such as household customers, small businesses and other companies like SME on specific consumer-related issues such as universal service obligation, protection concepts for vulnerable customers, where, however, the wide sector-specific definition of the concept should be maintained basically. By following a recent legal opinion it might be basically differentiated here between the consumer type of a responsible and a vulnerable consumer.⁵³³ As in the past, possibilities for reinforcing protection in relation to an

⁵³³See footnote 219.

expansion on other consumer groups in the context of a minimum harmonization are basically leave to the Member States.

It should be strictly differentiated within the meaning of art. 3 para. 2 Directive 2009/72/EC between the universal service as a public service obligation and other public service obligations. The connection requirement of systematic legal reasons alike as the guarantee of network access, to which art. 3 para. 3 s. 3 Directive 2009/72/EC teleologically also refers, should be codified in art. 3 para. 2 Directive 2009/72/EC as an additional public service obligation outside the rule of the universal service pursuant to art. 3 para. 3 Directive 2009/72/EC, which concerns the distribution side.

Based on the telecommunications legal concept of universal service should be resorted when determining the basic supply price to "affordable" instead of "reasonable" prices. A distinction, for which no reason can be seen, would behave contrary to the intention of the European Union legislature to protect notably the needy customers, who are increasingly threatened due to increasing energy prices in the future.

In relation to the protected target group consistency between art. 3 para. 3 Directive 2009/72/EC and art. 3 para. 7 Directive 2009/72/EC should be established. An option from the universal service obligation and for this purpose in favour of the European Union legislature existing alignment competence would be - contrary to the previously chosen approach concerning the selected household customer group - to determine this target group of customers connected to a certain voltage. All to low-voltage connected customers would be covered accordingly from the scope of the two above regulations. However, particular groups of customers connected to the medium-voltage level could be optionally covered in this respect in the form of a national protection reinforcement.

In order to improve the protection of vulnerable customers and thereby the social policy area the competence of the Union is limited in the sense of a purely coordinating role for the development of common guidelines and an ongoing dialogue with the Member States in relation to the production of a fruitful interaction between economic and social policy.

5.1.3.2 Change of supplier and customer protection activities by Directive 2009/72/EC Annex I - investigation results and regulatory deficits

The change of supplier, which must be easily implemented within the shortened period of three weeks, is to ensure according to the new requirements in particular cross-borders without discrimination.

With this in the Directive stated market-based approach of a rapid change of the supplier the electricity internal market completion should be stepped up further by an active consumer. It is necessary for this, in addition to the prohibition of discrimination to note the in Annex I Directive 2009/72/EC detailed designed transparency requirement in terms of general information and contract terms; in terms of a broad interpretation by the intention of the regulation concerning a comprehensive protection of consumers the need for transparency must extend also to the contract system itself.

The previously existing legal framework is substantially expanded in Annex I Directive 2009/72/EC by removing existing anti-competitive arrangements, adding new and updating already existing customer protection-related measures to be implemented by the Member States. This concerns in particular ensuring greater transparency in terms of customer and contract-related informations, mandatory compliance with customer-protection related deadlines and the prohibition of additional cost burdens as well as the discrimination against consumers.

Subsequent regulatory deficiencies, which the investigation has revealed, are to be cleared in a subsequent Directive.

For the sake of legal clarity art. 3 para. 7 s. 7 Directive 2009/72/EC is to separate in a new paragraph; for the aforementioned provision in conjunction with Annex I refers both by the wording and the purpose of a comprehensive consumer protection to all measures within the meaning of art. 3 para. 3 Directive 2009/72/EC, so on sales- as well as network-related measures including public service obligations.

In Annex I the term "customer" should be replaced by the term "low-voltage connected customers" with the proviso that this adaptation of the addressees in art. 3 para. 3 and para. 7 Directive

2009/72/EC is selected as possible option in the future; otherwise should be made reference to the term "household customers" in Annex I .

In order to legally secure delimitation within the national implementation the individual measures listed in Annex I have to be presented separately from each other divided by network and distribution services, in which other general energy services such as methods of payment, prepayment systems, out-of-court dispute settlement extending to both areas have to be preceded.

The term "prepayment systems" by Annex I para. 1 lit. d) s. 2 Directive 2009/72/EC is to be understood broadly and does not refer to its semantic content to the mere prepayment, but also on the so-called bail. For the sake of clarification an appropriate complement of the aforementioned term to the possible option of a general security, which in particular includes in addition to the cash security also the presentation of a bank guarantee and a letter of comfort, is useful.

5.1.4 Out-of-court dispute settlement

A strengthening of consumer protection through the creation of confidence in the cross-border competitive internal market for electricity requires a transparent, efficient, fair and impartial non-judicial dispute resolution where no shortening of legal action to the detriment of consumer may be take place. The European Union legislature intends this objective through a takeover of existing rules together with a newly inserted clarification, in which a resolution of disputes has to take place within three months.

The regulations on the mechanism of dispute settlement are subject to the following deficits.

It does not take place a clear separation between the handling of complaints, which represent no way of dispute resolution, and out-of-court dispute settlement in Annex I para. 1 lit. f) Directive 2009/72/EC from a legal dogmatic point of view.

Furthermore, the relationship between the dispute resolution within the meaning of art. 37 para. 11 Directive 2009/72/EC carried out by the regulatory authorities, for example, by complaints from customers against network operators and the aforementioned out-of-court dispute settlement

codified in Annex I para. 1 lit. f) Directive 2009/72/EC is not resolved. This special regulation-legal dispute resolution proceeds before the general dispute resolution. This is to point in Annex I para. lit. f) Directive 2009/72/EC, whereby in art. 37 para. 11 Directive 2009/72/EC in the case of household customers or optionally from to low-voltage connected customers the mandatory compliance with Annex I para. 1 lit. f) s. 3 et seq. Directive 2009/72/EC is to regulate complementary.

However, even a future elimination of these deficits in a subsequent Directive can not be ensure a largely harmonization on national level and thus a uniformly high quality level, the empowered consumer demands, in the case that there are particularly cross-border disputes. Therefore, the Union consequently aims through exercising its alignment competence according art. 114 TFEU through the adoption of the new cross-sectoral Directive on consumer ADR⁵³⁴ including the Regulation of consumer ODR⁵³⁵ at eliminating the already existing fragmentation including a resulting enhancement of unequal treatment in terms of legal remedies to achieve a high level of consumer protection.

5.1.5 Consumer protection legal regulatory law

Competition alone cannot ensure due to a lack of market incentives a proper provision of public services in the interest of the public welfare and thus the consumers. Due to the structural characteristics of electricity networks as natural monopolies the exclusion of competition based on the network side is a logical consequence. Therefore, energy companies shall be obliged through effective regulation, which aims in terms of a market-based regulatory law at ensuring transparent and non-discriminatory measures on the aforementioned network but in addition also on the distribution sector accordingly.

The Directive 2009/72/EC extends the previously existing regulatory legal framework in favour of national regulatory authorities both in terms of regulatory tasks and powers with a high level of detail significantly to achieve the protective purpose of a progressive internal electricity market opening through a specification of already existing regulations and the adoption of new rules.

⁵³⁴See footnote 477.

⁵³⁵See footnote 479.

The most important change is that the regulators are authorized now in relation to the distribution side also to carry out a market outcome control to protect consumers. The existing network-related regulatory powers are expanded by numerous powers ex-ante as well as new inspections and enforcement powers ex-post, which also provides, among other things, an execution by substitution by the regulatory authority.

Due to the direct applicability of European competition law provisions of art. 101 et seq. TFEU at national level the interaction in terms of effective competition supervision and effective regulation at national level is to balance out taking into consideration possible claim competitions so that neither of the two mechanisms are disturbed to the detriment of competition. For the regulatory authorities together with other relevant authorities, in particular the anti-trust authorities, have an important role to play in contributing to the proper functioning of the internal market in electricity.⁵³⁶

5.2 Statements – overall conclusion

From the results of the investigation the following statements are derived:

5.2.1 Statements

5.2.1.1 Statement 1

The internal market-independent consumer protection competence norm regarding art. 169 TFEU, which constitutes no powers beyond the internal market competence and does not justify any final internal market measures, retires as the final internal market competence basis contrary to art. 114 TFEU, which encompasses the energy sector-specific consumer protection law. However, by the Treaty of Lisbon newly introduced energy-specific competence title of art. 194 para. 2 subpara. 1 TFEU displaces as a *lex specialis* in the future the previous general alignment competence title of art. 114 TFEU concerning the alignment of the internal energy market both in terms of energy policy and energy sector-specific consumer protection objectives.

⁵³⁶Electricity Access Regulation (EC) No 714/2009 – recital (24).

5.2.1.2 Statement 2

The existing fragmentation of the general as well as the energy sector-specific consumer protection legislation is to eliminate gradually through the creation of a coherent fundamental concept on EU level but also through a national approximation of laws in the way of a mixed harmonization through a balance between a minimum and full harmonization taking into account the national specifics. Also in terms of the energy sector-specific consumer protection law the approximation of laws aims at a market benefiting as well as a market regulating steering function targeting to ensure effective competition as the “consumers best friend“.

5.2.1.3 Statement 3

Ensuring a functioning competition and a high level of consumer protection relate to each other symbiotically so they are, in other words, required mutually and together as part of the objective of the completion of the internal market in electricity. Namely by the EU legislature with the Directive 2009/72/EC intended promotion of cross-border consumer activities requires a high degree of confidence of the informed consumer in the market and thus transparent, non-discriminatory and legally secure customer protection measures.

5.2.1.4 Statement 4

The overall security of supply as an economic objective with the newly introduced universal service obligation is extended to a social political approach in the sense of a customer individualized security of supply. Between the universal service obligation in the sense of art. 3 para. 3 Directive 2009/72/EC and those in art. 3 para. 7 Directive 2009/72/EC securitized protection measures a tangible connection exists, which requires the creation of a coherence for the protected addressees to ensure a national minimum harmonization.

5.2.1.5 Statement 5

Due to the limitation of the EU competence in the sense of a mere coordination in the field of social policy for the protection of energy poverty affected vulnerable consumers the exertion of the EU influence to achieve likewise a fruitful interaction between economic and social policy in the internal market is limited to the adoption of guidelines as well as an ongoing dialogue with the national institutions.

5.2.1.6 Statement 6

The significantly expanded regulatory law codified in Directive 2009/72/EC contributes due to a number of specific new regulatory powers and duties in form of ex-ante and ex-post fixed regulation measures on the distribution and the network sector as well as in ensuring the fulfillment of public service obligations to achieve the objective of a further opening of the electricity market and thus a high level of consumer protection.

5.2.2 Overall conclusion

The protection of consumers is enhanced by the updated and new sector-specific consumer protection rules and significantly expanded through the regulatory legal framework in Directive 2009/72/EC. The harmonization of consumer protection legislation could be further developed at Member State level by the higher level of details including mostly clearer guidelines, however, without restricting the national discretion and thus the responsibility taking into account national specifics overly.

The European legal course to achieve the objective of a high level of consumer protection and thus a pro-competitive empowerment of consumers in the framework of an ongoing internal electricity market is prepared with the Directive 2009/72/EC as a further important step in the future. However, further steps may be required in this respect henceforward.

5.3 Outlook

The European electricity market faces new global challenges, particularly in relation to the fight against climate change including environmental policy issues with the goal of achieving the highest possible degree of conservation of resources, which is to reconcile with a safe, cost-worthy and efficient electricity supply by creating a transnational electricity grid infrastructure for the benefit of all EU citizens. More upcoming challenges in the coming years at the level of the internal electricity market such as increased energy efficiency creating European market areas including a cross-border electricity trade and network extension at European level are likely to require a further revision of existing or the codification of new rules. This new tasks in the future equally touching the protection of consumers and ensuring effective competition in the complex system of the electricity industry. The goal of creating and ensuring a functioning competition and thus the in the focus of Directive 2009/72/EC and the internal electricity market standing interests of the consumers, which are dependant on a high level of security of energy supply at competitive prices in a functioning internal market, moves also within this stress field to be solved.

Already numerous in art. 37 Directive 2009/72/EC listed market monitoring obligations of the regulatory authorities and reporting requirements of the Commission to the European Parliament and the Council in accordance with art. 47 Directive 2009/72/EC with regard to compliance of consumer protection-related regulations such as the existence of non-discriminatory access to the network, the benefits of market opening for household customers and small businesses as well as the existing possibilities indicate that the European Union legislature still anticipates existing uncertainties and shortcomings with regard to the completion of the internal electricity market, so already assumes a future continuation of the current legal framework of the Directive basically with special emphasis on the results of this market monitoring. This assumption is supported by the suggestion of an action plan by the Commission on ensuring the success of the internal energy market, with which all stakeholders will be encouraged to work towards the implementation of all measures proposed in this plan.⁵³⁷

The foreseeable and necessary process of a gradual continuation of the policy with the objective of completing the internal market in electricity including the completion of consumer protection at European level will therefore continue to require further efforts by all stakeholders at European and

⁵³⁷See footnote 115.

Member State level. Hereby, it is increasingly important that the voices of the consumers are also heard, so that they are able to influence the development of the market on the same basis as, for example, industry players.⁵³⁸

In this case, the limit for an effective European energy policy represents, of course, the individual Member State reserving right to determine the conditions and use of its energy resources, its choice between different energy sources and the general structure of energy supply according art. 194 para. 2 subpara. 2 TFEU, whereby problems in terms of a common energy policy also caused due to the fact that certain types of energy are excluded from combinability.⁵³⁹ Whether this structure marked primarily by the national interests of the different energy policies of individual Member States, which behaves partly in opposite to the development and thus the objective of completing the internal market, can be adjusted will be seen.

⁵³⁸ACER – Discussion Paper on Energy Regulation: A Bridge to 2025 Consumers and Distribution Networks 6 November 2013, p. 1 at p. 5.

⁵³⁹Classen, in Oppermann/Classen/Nettesheim, Europarecht, p. 412 para. 6.

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7 APPENDICES

7.1 Summary (English)

Consumer protection law in the internal electricity market aims to protect the responsible and informed consumer through various measures and thus enable him to operate as a self-determined market participant and so shape the market actively towards its completion.

What conditions are therefore necessary to reach this aim and to achieve the objective of a high level of consumer protection in the context of the ongoing electricity market taking into account the grid-based electricity supply, which is characterized by the natural monopoly of regulated networks as well as by competition for the homogeneous product electricity, and in what relationship belongs competition and consumer protection to each other ?

The dissertation examines these questions from the perspective of the energy sector-specific consumer protection provisions in Directive 2009/72/EC.

In part 1 a general overview of the development of the European internal market in electricity and of secondary legislation of energy law on the basis of Directive 2009/72/EC as well as the predecessor Directives 2003/54/EC and 96/92/EC is done first. Furthermore, the fundamental importance of the competition, his relationship with the consumer protection in the context of the intended completion of the internal energy market as well as the own energy competence title introduced by the Treaty of Lisbon according to art. 194 TFEU, which gives the Union for the first time an own energy sector-specific market competence, will be explained.

Part 2 gives a general historical outline to European consumer protection law. The development of the concept of consumers including the consumer model is initially shown both generally and by the example of Directive 2009/72/EC alike as the importance of creating a coherent European and harmonized national consumer protection legislation to eliminate the existing fragmentation. For, the meaning of the consumer protection and the arrangement of a legal harmonization is evident especially in the context of the completion of the European internal market.

Also the possible primary legal ways of the European legislature, which are available in relation to the adoption of the energy sector-specific consumer protection law in Directive 2009/72/EC, are pointed out. The central market-final harmonization norm of art. 114 TFEU will be distinguished to other possible competence rules such as art. 169 TFEU as well as art. 194 TFEU. In this context is examined in detail the relation of art. 114 TFEU to art. 194 TFEU from competence aspects to both the alignment of the internal electricity market and the energy sector-specific consumer protection.

The requirements developed by the ECJ case-law concerning the central alignment norm of art. 114 TFEU concerning Directive 2009/72/EC will be exemplified in general terms as well as in its scope in relation to this Directive as well as the market benefiting and market regulating function of the alignment including the factual connection between an effective consumer protection as well as an effective competition identified as prerequisite for an effective internal market in electricity.

Part 3 examines, to what extent the consumer rights in Directive 2009/72/EC codified are suitable, to achieve the objective of a high level of protection in favour of consumers in particular in regard to ensuring transparent conditions, the provision of general information, a non-discriminatory network access and thus an uncomplicated change of suppliers, the protection of vulnerable consumers affected by fuel poverty as well as ensuring the implementation of the universal service obligation. There is a representation of the universal service concept, which was extended to a socio-political approach in the sense of a customer-specific basic supply security, as well as a comparison of this energy sector-specific supply concept with the concept of the universal service in the telecommunications sector.

The customer protection concept applied as another focal point in the Directive 2009/72/EC is evaluated particularly in relation to vulnerable consumers and deferred to the European social policy, for which a mere coordination expertise consists of the European point of view. The customer-specific protection measures listed in Annex I Directive 2009/72/EC individually are compared with the provisions under Annex A of the previous Directive 2003/54/EC. Furthermore, it is clarified on the basis of the individual regulations, whether the protection of consumers and the safeguard of their interests are properly reflected in the Directive 2009/72/EC and where, if necessary, repair is needed due to still existing deficiencies.

In this context also the general principles of the alternative dispute resolution, the content in relation to their anchorage in Directive 2009/72/EC as well as existing weaknesses including the need for a cross-sectoral holistic approach at the European level, which the EU legislator now tries to pave the way in form of a newly adopted Directive, as well as a Regulation, are demonstrated.

After an introduction concerning the general functions of the national regulatory authorities with respect to the energy sector the factual context between network access as well as network tariff regulation and consumer protection is shown. The part ends with a detailed presentation of the vastly expanded possibilities, which are basically available for national regulatory authorities to protect consumers both in terms of the power sector as a factual monopoly as well as in terms of sales and thus the competitive field codified in the Directive 2009/72/EC.

In the final part 4 of the investigation a summary of the results obtained including the existing regulatory deficiencies on energy sector-specific consumer protection takes place. From the results of the investigations six statements are derived. The work ends with an overall conclusion as well as an outlook for the completion of the internal energy market and points to the need for further measures to achieve a high level of consumer protection in the ongoing internal electricity market.

7.2 Shrnutí (Česká)

Právo ochrany spotřebitele na vnitřním trhu s elektřinou má za cíl chránit svéprávného a informovaného spotřebitele na základě různých opatření, a tím mu umožnit, aby se sebeurčujícím způsobem jako účastník na trhu prosadil a aktivně spoluutvářel trh až k jeho dokonalosti.

Jaké předpoklady jsou podle toho k dosažení tohoto cíle a tím stanovení cílové pozice vysoké úrovně ochrany spotřebitele - v rámci pokračujícího rozvoje vnitřního trhu s elektřinou při zohlednění zvláštnosti zásobování elektřinou vázané na vedení, které je charakterizované přirozenými monopoly regulovaných sítí a zároveň také hospodářskou soutěží o homogenní produkt elektrického proudu - potřebné, a v jakém poměru zde proti sobě stojí hospodářská soutěž a ochrana spotřebitele?

Dizertační práce se těmito otázkami zabývá z pohledu předpisů na ochranu spotřebitele, specifických pro energetický sektor, uvedených ve směrnici ES: Elt-RL 2009/72/EG.

V části 1 je uveden nejdříve všeobecný přehled o vývoji evropského vnitřního trhu s elektřinou, včetně vývoje sekundárního práva energetického hospodářství na základě směrnice ES: Elt- RL 2009/72/EG a obou předchozích směrnic 2003/54/EG a 96/92/EG. Dále je vysvětlen základní význam soutěže včetně jejího vztahu k ochraně spotřebitele v rámci cílené snahy o dosažení dokonalého vnitřního trhu s energií, a také Lisabonskou smlouvou zavedený vlastní energetický kompetenční titul podle čl. 194 AEUV, jímž Unie poprvé dostává vlastní - pro energetický sektor specifickou - kompetenci pro vnitřní trh.

Část 2 podává všeobecný historický náčrt k evropskému právu na ochranu spotřebitele. Vývoj pojmu spotřebitel včetně hlavního obrazu spotřebitele je znázorněn jak všeobecně, tak také na příkladu směrnice ES: Elt-RL 2009/72/EG, stejně jako význam vytvoření koherentního unijního a harmonizovaného členského práva na ochranu spotřebitelů k odstranění stávající fragmentace. Význam ochrany spotřebitele a dosažení srovnání práva je totiž zvláště zřejmé v rámci zavedení evropského vnitřního trhu.

Dále je zobrazeno, jaké kompetenční možnosti z hlediska primárního práva má unijní zákonodárce ohledně vydání – pro energetický sektor specifických - právních předpisů na ochranu spotřebitele ve

směrnici ES: Elt-RL 2009/72/EG. Centrální finální norma srovnání práva pro vnitřní trh čl. 114 AEUV je zároveň vymezena vůči jiným možným kompetenčním normám jako čl. 169 AEUV a čl. 194 AEUV. V tomto kontextu je detailně přezkoumán vztah mezi čl. 114 AVEU k čl. 194 AVEU z kompetenčních hledisek, a sice jak ve vztahu srovnání práva vnitřního trhu s elektřinou, tak také ohledně práva na ochranu spotřebitele, specifického pro energetický sektor.

Předpoklady, vytvořené na základě související judikatury Evropského soudního dvora ohledně centrální srovnávací právní normy čl. 114 AEUV týkající se směrnice ES: Elt-RL 2009/72/EG, jsou vysvětleny jak ve všeobecné formě, tak také na příkladech ve vztahu na oblast použití směrnice. Zobrazena je rovněž trhu sloužící a trh upravující funkce srovnání práva včetně věcné souvislosti mezi efektivní ochranou spotřebitele a probíhající soutěží jako předpokladu pro účinně fungující vnitřní trh s elektřinou.

V části 3 se zkoumá, nakolik jsou práva spotřebitelů, kodifikovaná ve směrnici ES: Elt-RL 2009/72/EG, vhodná k tomu, aby bylo dosaženo vysoké úrovně ochrany ve prospěch spotřebitele, zejména ve vztahu k zajištění transparentních smluvních podmínek, existenci a dosažení všeobecných informací, nediskriminujícího přístupu k síti a tím nekomplikované změny dodavatele, dále zajištění ochrany před energetickou chudobou dotčených a ochranu vyžadujících spotřebitelů včetně stanovení povinnosti na základní zásobování. Následuje zobrazení univerzálního konceptu služby, který byl rozšířen o sociálně politický rozměr ve smyslu specifické zákaznické jistoty na základní zásobování a také porovnání tohoto - pro energetický sektor specifického - konceptu základního zásobování s univerzálním konceptem služby v telekomunikačním sektoru.

Koncept ochrany zákazníků, jako další těžiště uvedené ve směrnici ES: Elt-RL 2009/72/EG, se vyhodnocuje zejména ve vztahu k těm spotřebitelům, kteří vyžadují ochranu, a je vymezen vůči evropské sociální politice, pro kterou z unijního hlediska existuje pouze koordinační kompetence. Jednotlivě uvedená a na ochranu zákazníků zaměřená opatření, uvedená v příloze I směrnice ES: Elt-RL 2009/72/EG se porovnávají s úpravami v příloze A předchozí směrnice ES: Elt-RL 2003/54/EG a ve vztahu na jednotlivé úpravy je vysvětleno, zda ochrana spotřebitele a hájení jeho zájmů je ve směrnici ES: Elt-RL 2009/72/EG přiměřeně zohledněno, a kde v případě potřeby na základě stávajících deficitů nadále existuje potřeba zlepšení.

V tomto kontextu jsou také zobrazeny všeobecné zásady mimosoudních urovnání sporů, jejich úprava ve směrnici ES: ELT-RL 2009/72/EG, dále poukázání na stávající nedostatky včetně požadavku na sektor přesahující celistvé řešení na evropské úrovni, jemuž má být nyní zákonodárcem EU usnadněna cesta ve formě nově vydané směrnice včetně nařízení.

Po úvodu ohledně základních funkcí národních regulačních úřadů ve vztahu k energetickému sektoru je znázorněna faktická věcná souvislost mezi regulací v přístupu k síti včetně regulací úhrady a ochranou spotřebitele. Tato část končí detailním zobrazením značně rozšířených možností, které mají na základě úprav, kodifikovaných ve směrnici ES: ELT-RL 2009/72/EG, členské státní regulační úřady k dispozici nejen pro ochranu spotřebitelů včetně vazby na síťový sektor jako faktický monopol, ale také ve vztahu na oblast odbytu a tím na hospodářskou soutěž.

V závěrečné části 4 je souhrnné zobrazení získaných výsledků včetně stávajících nedostatků dané úpravy ve vztahu k ochraně spotřebitelů, která je specifická pro energetický sektor. Z výsledků zkoumání jsou odvozeny teze. Práce končí celkovým shrnutím a výhledem ohledně zdokonalení vnitřního trhu s energií a poukazuje na nutnost dalších opatření k dosažení vysoké ochrany spotřebitele na rozvíjejícím se vnitřním trhu s elektřinou.

7.3 Abstract, keywords (English)

7.3.1 Abstract

The thesis deals with the question about necessary conditions to achieve the objective of a high level of consumer protection in the context of the ongoing internal electricity market taking into account the grid-bound electricity supply, which is characterized by the natural monopoly of regulated networks as well as by competition for the homogeneous product electricity. It evaluates the relationship between effective competition and energy sector-specific consumer protection taking into account the energy-specific regulatory law and examines in detail the regulations of the Directive 2009/72/EC concerning consumer protection under the perspective of enabling the responsible and informed consumer to operate as a self-determined market participant and so shape the market actively towards its completion. After art. 114 TFEU as the existing central norm concerning the alignment of the internal energy market is distinguished from other possible competence rules like the new energy sector-specific competence title of art. 194 TFEU the requirements developed by the ECJ case law concerning art. 114 TFEU from the point of view of the energy sector-specific consumer protection are presented. The thesis clarifies both to what extent in Directive 2009/72/EC codified consumer rights are suitable to achieve the objective of a high level of consumer protection and what repair is required due to still existing deficiencies. The overall conclusion emphasizes that, although progress has been made already, further steps are necessary to achieve the objective of a high level of consumer protection in the ongoing internal electricity market.

7.3.2 Keywords

- Completion of the internal energy market
- Effective competition
- Energy sector-specific consumer protection
- High level of consumer protection
- Fragmented consumer protection law
- Principle of mixed harmonization
- Internal market related alignment competence
- Basic supply as an energy sector-specific universal service

- Promoting social customer protection
- Combating of energy poverty
- Effective regulatory oversight
- Network access and network tariff regulation

7.4 Abstrakt, keywords (Česká)

7.4.1 Abstrakt

Dizertační práce se zabývá otázkou nezbytných předpokladů pro dosažení cíle vysoké úrovně ochrany spotřebitele v kontextu rozvíjejícího se vnitřního trhu s elektřinou, a sice při zohlednění zásobování energií vázané na síť, které je charakterizováno přirozenými monopoly regulovaných provozovatelů sítí a zároveň soutěží o homogenní produkt elektřiny. Vyhodnocuje vztah mezi fungující soutěží a ochranou spotřebitelů, jako specifickým energetickým sektorem. Zde se detailně posuzuje právo regulace, specifické pro energetiku, a úpravy směrnice ES: Elt-RL 2009/72/EG (= směrnice EP a Rady 2009/72/ES), týkající se ochrany spotřebitele, a to z úhlu pohledu zodpovědného a informovaného spotřebitele, který jedná jako seburčující účastník trhu a tím sám aktivně utváří vnitřní trh za účelem jeho zdokonalení. Jakmile se čl. 114 AEUV jako stávající centrální srovnávací právní norma vnitřního trhu vymezí vůči ostatním možným kompetenčním normám jako novému - pro energetický sektor specifickému - kompetenčnímu titulu čl. 194 AEUV, jsou na základě souvisejících případů právních rozhodnutí Evropského soudního dvora vytvořené předpoklady čl. 114 AEUV zobrazeny z pohledu ochrany spotřebitelů, která je specifická pro energetický sektor. Dizertační práce objasňuje, zda jsou práva spotřebitelů, zakotvená ve směrnici ES: Elt-RL 2009/72/EG, vhodná k dosažení cíle vysoké úrovně ochrany spotřebitele, resp. jaká další vylepšení jsou na základě nadále trvajících deficitů potřebná. V rámci celkového závěrečného vyhodnocení je zobrazeno, že i přes již docílený pokrok jsou potřebné další kroky, aby mohlo být dosaženo cíle vysoké úrovně ochrany spotřebitele v rámci rozvíjejícího se vnitřního trhu s elektřinou.

7.4.2 Keywords

- Dotváření energetického vnitřního
- Fungující soutěž
- Pro energetický sektor specifická ochrana spotřebitelů
- Vysoká úroveň ochrany spotřebitelů
- Roztříštěné právo ochrany spotřebitele
- Zásada smíšené harmonizace
- Působnost ohledně harmonizace práva na vnitřním trhu

- Základní zásobování jako univerzální služba, specifická pro energetický sektor
- Podpora sociální ochrany zákazníků
- Boj proti energetické chudobě
- Účinný regulační dozor
- Regulovaný přístup k síti a regulovaná úhrada sítě